(1)

90-1931

No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

JOHN DAVIS; WAYNE BROUGHTON; DOUG DURBIN; ED RODIUS; and DON TAYLOR,

Respondents,

vs.

MASON COUNTY; MASON COUNTY SHERIFF'S DEPARTMENT; et al.,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Question One: Is the joint trial of factually unrelated claims involving alleged police brutality towards six plaintiffs by five different County sheriffs so prejudicial that the motion to bifurcate should have been granted to avoid manifest injustice?

Question Two: In a case involving municipal liability under 42 U.S.C. § 1983, is an instruction on intent including the "reckless disregard" standard erroneous under City of Canton, Ohio v. Harris, 109 S. Ct. 1197 (1989)?

Question Three: When a small county hires deputy officers under the state comprehensive civil service system, is the local sheriff a "policy making official" for purposes of municipal liability under 42 U.S.C. § 1983?

Question Four: When a county implements an official policy requiring officers to use only reasonable force, sends its deputies to the State Police Academy, and is subject to the State Civil Service Commission, is the county liable as a matter of law for failing to provide "training in the constitutional limits on the use of force?" Is the burden of proving deficient training properly shifted to the defending county, or should it remain with plaintiffs?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Mason County, et al., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit in John Davis, et al. v. Mason County, et al., Nos. 88-3947, 88-4394, 88-3951 (9th Cir. 1991).

OPINIONS BELOW

The decision of the Ninth Circuit, reproduced as Appendix I, is a published opinion. The Ninth Circuit affirmed a judgment on a jury verdict in favor of all plaintiffs and against all defendants. At trial, defendants moved to bifurcate the trials of four unrelated incidents. This motion was denied. See Appendices F, G and H.

GROUNDS FOR JURISDICTION

The decision of the Ninth Circuit was filed on March 12, 1991. This

court, and the courts below, have federal subject matter jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. The petition for certiorari is timely under SCR 13.1.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutes include 42 U.S.C. § 1983 and Revised Code of Washington (RCW) 41, et seq. These are included in Appendices B, C, D and E.

STATEMENT OF CASE

Four deputy sheriffs of Mason County, Sue Gardner, a deputy's wife, Mason County Sheriff's Department (Department), and Mason County (County) were sued by Doug Durbin, Don Taylor, John Davis, Wayne Broughton, and Ed Rodius, on claims of excessive force, false arrest, malicious prosecution and violation of constitutional rights. The

county and Department were sued on state and federal claims based on policies or customs of training, hiring, and supervision. A pretrial motion to sever the claims, which stemmed from four completely unrelated incidents, was denied. Judgment was entered on a jury verdict of $528,500 in compensatory and punitive damages and the court subsequently awarded attorney fees and costs of $325,000.

On appeal, in a 2-1 decision, the Ninth Circuit affirmed the judgment below, finding that defendants' motion to bifurcate did not preserve this issue for appeal; that inclusion of "reckless disregard" in the instruction on the standard for county liability under 42 U.S.C. § 1983 did not violate the requirement set out in City of Canton, Ohio v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989), that the

standard be no less than "deliberate indifference;" and that the County was liable for "failure to train in the constitutional limits on the use of force" because the Sheriff is a "policy making official." Chief Judge Wallace disagreed, stating in his dissenting opinion that Canton precludes liability based on "reckless disregard" and that Washington statutes make the Civil Service Commission -- not the Sheriff -- the final decision-maker in hiring, firing and training employees. Judge Wallace concluded that the County was not liable for the alleged conduct of the deputies.

The evidence at the underlying trial was hotly contested. The plaintiffs all testified that they were stopped by a County sheriff for no apparent reason, then beaten or assaulted and arrested. The deputies

testified that, in each instance, the plaintiff was violating the law, causing the officer to approach the plaintiff, and that no unnecessary force was used.

Ray Sowers testified that he attempted to stop Doug Durbin for speeding, running a stop sign, and possible drunk driving. Durbin ran into his house and refused to come out. When he finally emerged, Durbin was verbally abusive and resisted arrest to the point where he had to be forcibly handcuffed and transported to jail.

Deputy Doug Quantz testified that he was directing traffic near an accident scene on July 20, 1985. Donald Taylor apparently became upset at being misrouted and almost hit the officers with his car. Taylor refused to produce a license when stopped and tried to assault Quantz before Quantz was able to

subdue and arrest him for reckless driving and resisting arrest.

On July 29, 1985, Deputy Jack Gardner attempted to stop an improperly marked hay wagon which was obstructing traffic. Deputy Gardner testified that Davis, the wagon's driver, attempted to run him down, then threatened him with a pitchfork. Davis bit Gardner in the cheek and was verbally abusive. When reinforcements arrived, Davis was arrested and taken to jail. Like the other plaintiffs, Davis testified he was just driving his hay wagon when he was stopped for no reason, assaulted and beaten. Davis admitted biting Gardner's face, but claimed it was self-defense.

The final case involved Ed Rodius, who was drinking in a car stopped at a stop sign. Deputy Ray Sowers asked for identification which Rodius refused to provide, although he admitted he was

under the legal drinking age. Rodius was combative and assaulted the deputy. Rodius later pled guilty to the charge of minor purchasing alcohol. Like the other plaintiffs, Rodius denied wrongdoing, claiming he was assaulted for no reason. The jury found no compensatory damages for Rodius despite a stipulated medical bill.

The incidents involving plaintiffs occurred between June 29 and July 30, 1985, except for the Rodius incident of March 16, 1986. All the officers, except Sowers, were trained at the State Police Academy before the incidents occurred. Jack Gardner was an officer in Sumner before being hired by Mason County. There was no evidence of alleged excessive force after 1986.

The trial court denied a pretrial motion to sever claims under Fed. R. Civ. P. 21 and 42(b). The Ninth Circuit

affirmed on procedural grounds, claiming that the motion did not adequately preserve the issue for appeal (Motion to Bifurcate, Appendices F, G, and H). The jury was instructed that the County was liable under § 1983 if either reckless disregard or deliberate indifference was established. Instruction 39, Appendix I-11. The jury was also instructed that the sheriff was a "policy making official," even though the Civil Service Commission has authority over hiring and firing decisions. See Instruction 41, Appendix I-15. These instructions were approved by the Ninth Circuit in a 2-1 opinion, Chief Judge Wallace dissenting on the issue of County liability.

REASONS FOR GRANT OF THE WRIT

QUESTION ONE: IS THE JOINT TRIAL OF FACTUALLY UNRELATED CLAIMS INVOLVING ALLEGED POLICE BRUTALITY TOWARDS SIX PLAINTIFFS BY FIVE DIFFERENT COUNTY SHERIFFS SO PREJUDICIAL THAT THE MOTION

TO BIFURCATE SHOULD HAVE BEEN GRANTED TO AVOID MANIFEST INJUSTICE?

Supreme Court Rule 10.1(a) authorizes a writ of certiorari when a circuit court "has so far departed from the accepted and usual course of proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Certiorari is also authorized when the circuit court "has decided a federal question in a way that conflicts with the applicable decisions of [the Supreme] Court." SCR 10.1(c). The Ninth Circuit opinion here violates both rules. Further, the issues involved in this case are of public concern, frequently occur, and should be resolved. Certiorari is also appropriate to ensure uniformity of federal law applied to allegations of policy misconduct which arise frequently and

evoke intense emotions on both sides of the dispute. When important issues are raised, certiorari is appropriate. Cantor v. Detroit Edison Co., 428 U.S. 579, 581, 96 S. Ct. 3110, 3112, 49 L. Ed. 2d 1141 (1976); United States v. Janis, 428 U.S. 433, 96 S. Ct. 3021, 3025, 49 L. Ed. 2d 1046 (1976); Furnco Construction Corp. v. Waters, 438 U.S. 567, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978).

Trials on police misconduct and resultant municipal liability clearly affect both the public purse and the public interest. Conduct of these trials, as of any trial, should afford all parties a fair opportunity to litigate their case. Joinder of trials on four unrelated incidents violated federal joinder rules (Fed. R. Civ. P. 20) and denied defendants a fair

trial on the merits of each individual case.

The prejudice here was massive. The improper consolidation of the cases meant evidence on any and all alleged acts of misconduct was admitted, even though most of the evidence would have been excluded had separate trials been ordered. Extensive background information on all defendants was heard by the jury, including evidence on "violent" or "unacceptable" behavior admitted solely on state law claims of negligent hiring by Mason County. Combining all the claims together, even though the joinder requirements of Fed. R. Civ. P. 20 ("common transaction or series of transactions") were not met, created a false impression of law enforcement in Mason County and cumulatively created an inflated assessment of the nature and value of the claims. Failure to sever,

and affirmance of that failure, is contrary to authority in other circuits holding that separate trials are especially necessary when evidence supporting one claim results in prejudice as to the other claims or creates a strong possibility of juror confusion. See, e.g., L. E. Whitham Construction Co. v. Ramer, 105 F.2d 371 (10th Cir. 1939); Hammons v. Adams, 786 F.2d 1253 (5th Cir. 1986). Defendants were entitled to have their cases determined on the facts specifically relevant to their own situation. Cohen v. District of Columbia National Bank, 59 F.R.D. 84 (D.C. 1972). They were denied this right by failure to sever the claims.

The Ninth Circuit's refusal to review this issue is a departure from the standard that review will be allowed to avoid manifest injustice. The Ninth

Circuit further ignored the motion to bifurcate which specifically pointed out the prejudice inherent in trying the cases together, stated that the claims were based on "divergent causes of action which arose out of unrelated dates, activities and events . . .," and requested severence to avoid prejudice. App. G. The Ninth Circuit elevated form over substance in refusing to review the issue and perpetuated the denial of a fair trial to the County and to the individual defendants.

QUESTION TWO: IN A CASE INVOLVING MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983, IS AN INSTRUCTION ON INTENT INCLUDING THE "RECKLESS DISREGARD" STANDARD ERRONEOUS UNDER CITY OF CANTON, OHIO V. HARRIS, 109 S. CT. 1197 (1989)?

The court's instruction to the jury allowed a finding of County liability under § 1983 if the jury found either reckless or thoughtless disregard or deliberate indifference. Appendix

I-39. The Ninth Circuit affirmed the instruction on alternate grounds, stating that trial counsel failed to preserve the error for appeal and that the instructions as a whole were not inconsistent with the deliberate indifference standard of City of Canton, Ohio v. Harris, supra. The Ninth Circuit noted in its opinion that two other circuits "have suggested that § 1983 liability may be imposed on a municipality if it exhibits a "reckless disregard" for an individual's constitutional rights." Appendix A. In D.T. v. Independent School District No. 16, 894 F.2d 1176 (10th Cir.), cert. denied, 111 S. Ct. 213 (1990), the Tenth Circuit implied that "reckless disregard" satisfies the Canton standard. Similarly, in Clipper v. Takoma Park, Maryland, 876 F.2d 17 (4th Cir. 1989), the Fourth Circuit reaffirmed the "deliberate

indifference to or reckless disregard" standard applied by that Circuit prior to the Canton decision.

The Circuits are not following Canton in instructing that reckless disregard satisfies the deliberate indifference standard.

It is well established that municipal liability cannot be based on respondeat superior or negligence. Monell v. Department of Social Services, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). To avoid violating this principle, the standard of intent must be, at a minimum, deliberate indifference. Any lesser standard lacks the volitional element that avoids a Monell violation. As pointed out by the dissent in this case, "Canton requires the jury to find an element of deliberateness; the district court's instructions did not." Appendix A-84.

Under the instructions in this case, and under those approved by the Fourth and Tenth Circuits, no intent need be shown: mere disregard is a sufficient basis for liability. The Circuit courts are misinterpreting the Canton decision, necessitating review and clarification by this court.

QUESTION THREE: WHEN A SMALL COUNTY HIRES DEPUTY OFFICERS UNDER THE STATE COMPREHENSIVE CIVIL SERVICE SYSTEM, IS THE LOCAL SHERIFF A "POLICY MAKING OFFICIAL" FOR PURPOSES OF MUNICIPAL LIABILITY UNDER 42 U.S.C. § 1983?

Washington has adopted a comprehensive Civil Service system which regulates personnel decisions by county Sheriff's Departments, including Mason County. See Appendices C-E, RCW 41, et seq. Nonetheless, the jury was instructed that "the Sheriff of Mason County is the chief law enforcement officer of that County and a policy-making official for the Mason County's

Sheriff's Office." As pointed out by the dissent, this is contra to Washington state law which makes the Civil Service Commission the final authority for personnel decisions. RCW 41.14. Washington case law establishes that the statute preempts the county sheriff's discretion in personnel matters. Fezzey v. Dodge, 33 Wn. App. 247, 249, 653 P.2d 1359, 1361 (1982); Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners, 92 Wn.2d 844, 601 P.2d 943 (1979).

Training and hiring decisions are vested in the Civil Service Commission. Plaintiffs' claims against the County were based on hiring, training, and firing. The erroneous instruction that the sheriff is the policy-making official virtually directed a verdict on all three theories: hiring, training and supervision. The federal court is

required to follow state law in determining who is a policy-making official. Jett v. Dallas Independent School District, 109 S. Ct. 2702, 2723 (1989). Municipal liability attaches "only where the decision-maker possesses final authority to establish municipal policy. . . ." Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986).

The issue of when and how a municipality is liable for acts of county officials is of paramount public importance. It affects the finances and conduct of cities, counties, states, and municipal corporations throughout the country. The issue arises constantly, and in many guises. The Ninth Circuit opinion ignores both state and federal law in adopting an erroneous standard for liability. Pembaur and City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), support the conclusion that

state law determines who has policy-making authority. Where a Civil Service Commission has ultimate decision-making authority, liability cannot be based on the actions of an employee. Review is warranted because the Ninth Circuit has not followed these rules, and because the issue is an important and recurring one.

QUESTION FOUR: WHEN A COUNTY IMPLEMENTS AN OFFICIAL POLICY REQUIRING OFFICERS TO USE ONLY REASONABLE FORCE, SENDS ITS DEPUTIES TO THE STATE POLICE ACADEMY, AND IS SUBJECT TO THE STATE CIVIL SERVICE COMMISSION, IS THE COUNTY LIABLE AS A MATTER OF LAW FOR FAILING TO PROVIDE "TRAINING IN THE CONSTITUTIONAL LIMITS ON THE USE OF FORCE?" IS THE BURDEN OF PROVING DEFICIENT TRAINING PROPERLY SHIFTED TO THE DEFENDING COUNTY, OR SHOULD IT REMAIN WITH PLAINTIFFS?

The official county policy, which the court refused to give as a jury instruction, is that officers use only reasonable force. Mason County followed state law in sending all officers to the State Police Academy, although one

officer was sent a month late. Additionally, as noted above, the Civil Service Commission is responsible for hiring and firing decisions. Nonetheless, the Ninth Circuit held, as a matter of law, that "the County was negligent as a matter of law for failing to train in the constitutional limits of the use of force." Appendix A-38.

Plaintiffs presented no evidence on deficiencies in the State Police Academy training on use of force. Further, assuming arguendo that plaintiffs' allegations are true, it is questionable that "training" would affect violent, unprovoked beatings of innocent citizens. It is impossible that any officers, trained or untrained, would believe it acceptable to assault civilians for no reason as plaintiffs allege here. The requisite connection to training was never made.

Municipalities face an increasing flood of litigation. This decision further opens the floodgates, shifting the burden of proof on training to the county and finding failure to train without requiring any evidence of the type of training given by the State Academy. Again, given the thousands of functions performed by municipalities, and the enormous potential liability, it is important to establish clear guidelines for municipalities to follow. This opinion does the opposite, erasing the requirements of Canton and other cases requiring that plaintiffs show a clear nexus between the alleged constitutional violation and deficient training.

Review is necessary to address the issues of whether a small rural county may rely on the state Police Academy and the Civil Service Commission or whether

it must establish additional, super-ograms to avoid § 1983 liability. It is also essential to prevent further erosion of Canton and to clarify what must be established to show § 1983 liability.

CONCLUSION

Petitioners respectfully request that the court grant certiorari to resolve these issues concerning municipal liability for hiring, training and supervision, and the County's right to rely on training offered by the state Civil Service Commission.

DATED this 10 day of June, 1991.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By Nancy K McCoid
Nancy K. McCoid
Of Attorneys for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DAVIS; WAYNE BROUGHTON, a minor, through his guardian and mother SHARON BROUGHTON; DOUG DURBIN; ED RODIUS, and DON TAYLOR, Plaintiffs-Appellees-Cross-Appellants, vs. MASON COUNTY; MASON COUNTY SHERIFF'S DEPARTMENT; PETE CRIBBEN, in his capacity as a Mason County Deputy Sheriff and as an individual; JACK GARDNER, in his capacity as a Mason County Deputy Sheriff and as an individual; SUSAN GARDNER, his wife, and the marital community composed thereof; GARRY OHLDE, in his capacity as a Mason County Deputy Sheriff and as an individual; DOUG QUANTZ, in his capacity as a Mason County Deputy Sheriff and as an individual, and; RAY	Nos. 88-3947, 88-4394, 88-3951 D.C. No. CV-86-485-TB ORDER AND AMENDED OPINION

SOWERS, in his capacity as a Mason County Deputy Sheriff and as an individual,

Defendants-Appellants-Cross-Appellants.

Appeal from the United States District Court for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued, Submission Deferred December 4, 1989
Resubmitted December 13, 1989--Seattle, Washington

Filed March 12, 1991
Amended May 6, 1991

Before: J. Clifford Wallace, Chief Judge, Harry Pregerson and Dorothy W. Nelson, Circuit Judges.

Opinion by Judge Pregerson; Partial Concurrence, Partial Dissent by Chief Judge Wallace

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SUMMARY

Civil Rights

Affirming a district court judgment entered after a jury verdict finding

Mason County, its sheriff and several deputies liable for section 1983 violations, the court of appeals held that Mason County's failure to adequately train its law enforcement officers in the constitutional limits of the use of force constituted deliberate indifference to the safety of its inhabitants as a matter of law.

Various individuals were arrested without probable cause, severely beaten, and then subjected to false criminal charges by Mason County Washington, sheriff deputies in four separate incidents occurring within a nine-month period. A jury returned verdicts against all the individual deputies and the County under 42 U.S.C. § 1983, awarding compensatory and punitive damages and attorneys' fees. The district court refused to grant a motion for a directed verdict on the issue of the municipal

liability of Mason County and the Sheriff's Department.

[1] A directed verdict is inappropriate if there is substantial evidence to support a verdict for the non-moving party. [2] Although municipalities may be held liable under section 1983 for actions that result in a deprivation of constitutional rights, such liability is incurred only when execution of a government's policy or custom, whether made by its lawmakers of by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. [3] To establish municipal liability under section 1983, it must be shown that the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. [4] The training of peace officers on the use of force is a type of law enforcement practice that

falls squarely within the policymaking authority of a County Sheriff. [5] The trial court properly instructed the jury that failure to train could serve as the basis of County liability if the County exhibited a "reckless disregard for" or a "deliberate indifference to" the safety of its inhabitants. [6] Where a jury instruction correctly stated the law of the circuit at the time it was given, yet subsequent authority changed the law, consideration on appeal is not barred by the "act that no exception was taken to the instruction at the time of trial. [7] Even if Mason County did object to the jury instruction regarding the standard for municipal liability, the district court still did not commit reversible error. The appellate court did not find the instructions, taken as a whole, to be inconsistent with the "deliberate indifference" standard

enunciated in City of Canton. [8] Similarly, the district court's definition of reckless disregard was effectively the same as the language cited from that case. Both allowed a jury to impose municipal liability in failure-to-train cases for acts that so clearly violate the rights of an individual that the policymakers can be said to be deliberately indifferent.

[9] The jury instruction on the failure-to-train liability was nevertheless harmless because Mason County's failure to adequately train its deputies constituted deliberate indifference as a matter of law. [10] In this case, virtually no training for the deputies existed. The deputies had either never attended the State Training Academy or lacked training and experience. Indeed, the Sheriff's training program had been called a

"joke." [11] The deprivation of plaintiffs' fourth amendment rights was a direct consequence of the inadequacy of the training the deputies received. There was certainly more than enough evidence presented regarding the inadequacy of training to survive Mason County's motion for a directed verdict on the issue of municipal liability.

[12] Mason County's argument that the punitive damages award under section 1983 should be stricken because there was insufficient evidence of evil intent or motive was completely without merit because the alternative basis for assessing punitive damages is reckless or callous indifference to the federally protected rights of others. A jury could well infer "reckless or callous indifference" from the excessive use of force by the deputies. [13] The court rejected Mason County's argument that

the remedial measures taken rendered punitive damages unnecessary. The jury obviously felt that the punitive damages were necessary to deter future unlawful and egregious behavior on the part of the defendants. [14] In addition, the court noted that the Supreme Court has held that punitive damages may be available under section 1983 where there has been a violation of constitutional rights even though the victim is unable to show compensable injury. [15] The court also held that under Casey, the district court could not use section 1988 as a basis for awarding expert witness fees in excess of the limits imposed by sections 1821 and 1920. Therefore, the court remanded to the district court with instructions to modify the award of expert witness fees consistent with Casey. [16] The district court properly awarded

attorneys' fees on the basis of the relevant community and using the "lodestar" method of calculation. The award was not properly reduced to the extent that plaintiffs failed to prevail on their claims for injunctive relief.

Chief Judge Wallace dissented from the affirmance of liability against Mason County.

COUNSEL

Nancy K. McCoid, Merrick, Hofstedt & Lindsey, Seattle, Washington, for the defendants-appellants.

Timothy K. Ford and Kathleeen Wareham, MacDonald, Hoague & Bayless, Seattle, Washington: Robert Wilson-Hoss, of Hoss & Wilson-Hoss, Shelton, Washington, for the plaintiffs-appellees.

ORDER

The opinion in the above-captioned case filed on March 12, 1991, is amended as follows:

1. Delete the section starting on page 2622 entitled "A. Expert Witness Fees" and replace with the following language:

> A. Expert witness fees
>
> The district court granted $29,217.18 for plaintiffs' expert witnesses, the largest element of expenses awarded. Mason County argues that payment of expert witness fees as expenses is precluded by the Supreme Court's decision in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). Crawford Fitting holds that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] § 1821(b), absent contract or explicit statutory authority to the contrary." 482 U.S. at 439.[1]

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[1]28 U.S.C. § 1821(b) limits witness fees to $ 30.00 per day.

Plaintiffs originally contended that 42 U.S.C. 1988 provides statutory authority for awarding expert witness fees greater than those allowed under 28 U.S.C. § 1821, a question left open in Crawford Fitting. See 482 U.S. at 445 (Blackmun, J., concurring) ("I join the Court's opinion and its judgment but upon the understanding that it does not reach the question whether, under 42 U.S.C. § 1988, a district court may award fees for an expert witness."). In our opinion filed March 12, 1991. we held that, consistent with the majority of circuit courts to consider the issue, section 1988 allows a prevailing plaintiff to recover reasonable expert witness fees regardless of the limits of 28 U.S.C. §§ 1821 and 1920.[2] But after the

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[2]28 U.S.C. § 1920 reads:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal:

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case:

(continued next page)

opinion was filed the Supreme Court in West Virginia University Hospitals, Inc., v. Casey, 59 U.S.L.W. 4180 (March 19, 1991), reached the opposite conclusion. The Court held that "[42 U.S.C.] § 1988 conveys no authority to shift expert fees." 59 U.S.L.W. at 4185.

In their motion to modify our March 12. 1991 opinion, plaintiffs now concede that, under Casey, the district court's award of expert witness fees cannot stand. Under Casey, the district court may not use section 1988 as a basis to award expert witness fees in excess of the limits imposed by 28 U.S.C. §§ 1821 and 1920. We remand to the district court with instructions to modify the award of expert witness fees consistent with Casey.

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[2] (continued)

(3) Fees and disbursements for printing and witnesses:

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case:

(5) Docket fees under section 1923 of this title.

2. On pages 2624-2625, delete footnote 8.

3. On page 2628, the last sentence of the majority opinion should read:

> In addition, we remand to the district court to determine the proper accounting of travel expenses for plaintiffs' attorneys and of expert witness fees.

PREGERSON, Circuit Judge:

Mason County, its sheriff and several deputies appeal from a jury verdict finding them liable under 42 U.S.C. § 1983 for damages for excessive force used while arresting citizens in four separate incidents. We affirm the jury verdict and find municipal liability of Mason County and the Sheriff's Department.

BACKGROUND

Each of the plaintiffs-appellees' complaints arose out of traffic stops which resulted in arrests, beatings, and false charges that were later dropped. The incidents occurred within a nine-month period between June, 1985 and March, 1986.

A. The Durbin Incident

Early on the morning of June 29, 1985 as Doug Durbin returned home from a local tavern, Deputy Ray Sowers followed him and waited outside of Durbin's home. Deputy Tom Furrer later arrived as backup. Sowers, flicking an electric stun gun on and off, ordered Durbin out of his house. Durbin, who complied, was arrested for drunk driving. After taking one step toward his house, the two deputies tackled Durbin and threw him to the ground. Though Durbin never attempted to resist, Sowers began to

beat him on the back of his head with his fist. In the patrol car on the way to the jail Sowers slammed on the brakes, causing Durbin, who was handcuffed and thus defenseless, to smash into the screen with his face.

Durbin was charged with driving while intoxicated[1], resisting arrest and obstructing an officer. Yet after Durbin signed a "Release and Satisfaction" against Mason County, the charges against him were dismissed.

B. The Taylor Incident

Deputy Doug Quantz pulled over Don Taylor as he was driving through Shelton on the afternoon of July 20, 1985, allegedly for driving too fast. Quantz ordered Taylor to spread-eagle against the patrol vehicle and proceeded to

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[1]Durbin's breathalyzer test, taken at the Mason County Jail, read .05, well below the legal definition of intoxication.

conduct a pat-down search. Under the guise of this search, Quantz twisted the skin on Taylor's arms and legs, struck him on the sides, hit him in the testicles, and slammed him against the side of the patrol car. Later, in the jail elevator, Quantz hit Taylor in the kidneys with his fist.

After signing a "Partial Covenant Not to Sue," promising not to bring charges against Mason County, the charges against Taylor, including reckless driving, obstructing an officer, and resisting arrest, were dropped.

C. The Davis/Broughton Incident

John Davis and his fifteen year-old nephew, Wayne Broughton, were driving a loaded hay wagon drawn by a team of four horses on the afternoon of July 28, 1985. Because some cars were slowed behind the wagon, Deputy Jack Gardner

came alongside the wagon in his patrol vehicle and, using his loudspeaker, ordered Davis to pull over. Davis lost control over the horses, who had been frightened by the noise of the loudspeaker. Gardner pulled in front of the wagon, took out his gun, pointed it at Davis and Broughton and threatened to shoot if they did not stop. As Davis got down from the wagon to attend to his horses, Gardner beat him on the legs with his nightstick and struck him on the head. He then knocked him down to the ground and continued to beat him. After Deputies Pete Cribben and Garry Ohlde arrived at the scene, all three hit him, kicked him, and shocked him with an electric stun gun. According to one witness, Davis "looked like he had been dipped in a bucket of blood" after the officers finished beating him.

Deputy Gardner's wife, who had been riding with him as a passenger and who was not an officer, ordered Broughton down from the wagon, and then took him by the arm and put him in the patrol car. After being questioned for an hour, Broughton was released.

Davis was arrested and charged with felony assault, resisting arrest and obstructing an officer. The misdemeanor charges were dismissed, and a jury, which found that Davis was acting in self-defense, acquitted him of the felony charge.

D. The Rodius Incident

When Deputy Ray Sowers observed four young people talking between a car and a truck on the evening of March 15, 1986, he pulled over both vehicles. Sowers ordered Ed Rodius, a passenger in the truck, into the patrol car after he asked why they had been stopped. When

Rodius refused to comply, Sowers jumped on Rodius, choked him, pulled on his hair, and then threw him to the ground and rubbed his face on the gravel of the parking lot.

Rodius was arrested and charged with possession of alcohol as a minor, purchasing liquor, and resisting arrest. Rodius was tried twice on the resisting arrest charge. The first trial resulted in a hung jury, and the second was declared a mistrial after the prosecution violated a motion in limine by referring to the case at bar in front of the jury. The Mason County Prosecutor's office eventually dismissed the charges.

In the present case, the jury returned verdicts against all the individual deputies and the County, awarding $528,000 in compensatory and punitive damages and $325,000 in

attorneys' fees and costs. The jury awarded $225,000 in punitive damages and $150,000 compensatory to Davis: $10,000 in punitive and $5,000 compensatory to Broughton; $25,000 in punitive and $5,000 compensatory to Durbin: $25,000 in punitive and $0 compensatory to Rodius, and $35,000 in punitive and $1,500 compensatory to Taylor.

Defendants-appellants timely appealed. This court has jurisdiction over the appeal under 28 U.S.C. § 1291.

DISCUSSION

I. Whether the district court erred in denying defendants' motion to sever.

Defendants-appellants (collectively "Mason County") argue that the district court erred in denying their motion to sever. This argument is based on two theories. First, they contend that the requirements for permissive joinder were not met. Second, they maintain that

even if the requirements for permissive joinder were met, the motion to sever the plaintiffs' claims should have been granted because not doing so resulted in prejudice to the individual defendants.

Federal Rule of Civil Procedure 42(b) gives a district court broad discretion to order separate trials. A district court's decision regarding severance may be set aside only for abuse of discretion. United States v. Sanchez-Lopez, 879 F.2d 541, 551 (9th Cir. 1989). Under the abuse of discretion standard, a reviewing court cannot reverse unless it has a definite and firm conviction that the district court made a clear error of judgment in its conclusion. Abatti v. Commissioner, 859 F.2d 115, 117 (9th Cir. 1988).

A. Permissive Joinder

Mason County did not raise the issue of whether the requirements for

permissive joinder were met below. They are thus precluded from raising it now. This court will not "review an issue not raised below unless necessary to prevent manifest injustice." International Union of Bricklayers and Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1404 (9th Cir. 1985). This court will address the issue only if the proponent can point to "exceptional circumstances why the issue was not raised below." Id. (quoting Taylor v. Sentry Life Ins. Co., 729 F.2d 652, 655-56 (9th Cir. 1984) (per curiam)). Because Mason County does not show any reasons why they failed to raise the issue below, this court will not consider the issue.

B. Prejudice to the Defendants/Appellants

Mason County moved before trial to sever the claims of the plaintiffs

because, they argued, joinder would result in prejudice to the individual defendants. It is true that by trying the claims against the individual defendants with the claims against Mason County and the Sheriff's Department, evidence of the series of incidents of excessive force involving different police officers which would have been inadmissible against individual defendants not involved in the particular episode, were admissible against the County and the Sheriff's Department in order to show a pattern of misconduct.

Yet, while severing the defendants would have surely eliminated this prejudice, severing the plaintiffs would not have solved the problem. Even if each plaintiff had a separate trial, evidence of a pattern of misconduct would still have been admitted because

each plaintiff presented a claim against at least one defendant and against the County. Since defendants requested severance of the plaintiffs' claims, the court below did not abuse its discretion in rejecting the motion.

II. Whether the district court erred in not granting a directed verdict on the issue of municipal liability of Mason County and the Sheriff's Department, and whether the jury was properly instructed on the issue.

[1] A directed verdict is proper if the court finds that the evidence and its inferences, viewed in the light most favorable to the non-moving party, permits only one reasonable conclusion as to the verdict. Peterson v. Kennedy, 771 F.2d 1244, 1256 (9th Cir. 1985), cert. denied, 475 U.S. 1122 (1986). A directed verdict "is inappropriate if there is substantial evidence to support a verdict for the non-moving party." Id. Jury instructions are reviewed for

abuse of discretion. Maxwell v. Hapag-Lloyd Aktiengesellschaft, Hamburg, 862 F.2d 767, 768 (9th Cir. 1988).

[2] Plaintiffs sued the individual deputies, Mason County, and the Sheriffs Department for violation of their federal constitutional rights protected by the Fourth Amendment. Municipalities may be held liable under 42 U.S.C. § 1983 for actions which result in a deprivation of constitutional rights. Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 (1978). However, a municipality cannot be held liable on a respondeat superior theory. Id. at 691. Municipal liability is incurred under section 1983 only when "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury...." Id. at 694.

The Supreme Court recently addressed the issue whether the inadequacy of police training may result in municipal liability under section 1983 in City of Canton v. Harris, 489 U.S. 378 (1989). In determining liability the Court said that the adequacy of the training program must be assessed in relation to the tasks the officers must perform. Id. at 390. Further, the failure to train must "reflect[] a 'deliberate' or 'conscious' choice by a municipality--a 'policy'...." Id. at 389.

A. Sheriff Nat Stairs was a policy/making official

[3] To establish municipal liability under section 1983 it must be shown that the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered. Pembaur v. City of Cincinnati,

475 U.S. 469, 481 (1986) (plurality opinion). Because "municipalities often spread policymaking authority among various officers," a particular officer may have authority to establish binding policy with respect to particular matters but not others. Id. at 483. According to Washington law, in counties organized like Mason County, "[t]he sheriff is the chief executive officer and conservator of the peace of the county." Wash. Rev. Code § 36.28.019 (1990). As chief executive officers, sheriff's possess final authority with respect to the training of their deputies, and thus it may be fairly said that their actions constitute county policy on the subject.

The dissent argues that "final authority for personnel administration does not rest with the county sheriff; rather it rests with the civil service

commission." Dissenting opinion at 5692. This conclusion misses the point: the majority opinion holds that Mason County is liable as a matter of law for failing to train its officers on the constitutional limits of force--not for its hiring practices.

The purpose of the Washington Sheriff's Office Civil Service statute "is to establish a merit system of employment for county deputy sheriffs and other employees of the office of county sheriff...." Wash. Rev. Code § 41.14.010; Feezey v. Dodge, 33 Wash. App. 247, 249, 653 P.2d 1359, 1361 (1982). To this end, the Commission is empowered to make rules and regulations regarding "appointments, promotions, reallocations, transfers, reinstatements, demotions, suspensions, and discharges," along with "other matters connected with the general

subject of personnel administration." Wash. Rev. Code § 41.14.060(1). But nowhere does the statute extend the Commission's powers to the field of law enforcement, or specifically in this case, peace officer training. See Clallam County Deputy Sheriff's Guild v. Board of Clallam County Comm'rs, 92 Wash. 2d 844, 847, 601 P.2d 943, 946 (1979) (en banc) ("A full reading of [§ 41.14 of the Revised Code of Washington] reveals that in its enactment the legislature intended to preempt the coverage by county personnel systems of deputy sheriffs' selection, promotion and termination." (emphasis added).

Our holding is consistent with the Supreme Court's teachings in City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), and Pembaur v. City of Cincinnati, 475 U.S. 469 (1986). Both

provide for municipal liability in the circumstances here. The example in Pembaur, reiterated in Praprotnik, bears repeating:

> [T]he County Sheriff may have discretion to hire and dire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, would give rise to municipal liability.

Id. at 483 n.12 (plurality opinion) (emphasis added); see Praprotnik, 485 U.S. at 140 (Brennan J. concurring).

[4] This example explains that a Sheriff can be the official policymaker regarding law enforcement practices without having final authority over all of its employees' employment practices. This is the case here. The training of

peace officers on the use of force is a type of law enforcement practice that falls squarely within the policymaking authority of a County Sheriff.

B. Jury instructions with respect to municipal liability

[4] The trial judge instructed the jury that failure to train could serve as the basis of County liability if the County exhibited a "reckless disregard for or a deliberate indifference to" the safety of its inhabitants. The instructions given by the district court required a higher mental state than the "gross negligence" standard prescribed by this circuit at that time. See Bergquist v. County of Cochise, 806 F.2d 1364, 1369-70 (9th Cir. 1986). The County did not object to the instructions. After trial, however, the Supreme Court held in City of Canton v. Harris that failure-to-train liability

is proper "only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." 489 U.S. at 388.

[6] Mason County now argues that it was reversible error to instruct on the "reckless disregard" standard for failure-to-train liability in addition to the "deliberate indifference" standard. We have held that where a jury instruction correctly stated the law of the circuit at the time it was given, yet subsequent authority changed the law, consideration on appeal is not barred by the fact that no exception was taken to the instruction at the time of trial. Robinson v. Heilman, 563 F.2d 1304, 1307 (9th Cir. 1977). "No exception is required when it would not have produced any results in the trial court because a 'solid wall of Circuit

authority' then foreclosed the point." Id. The rationale for this rule is that while district courts should not be burdened by objections to settled points of law, neither should parties be penalized for failing to object if this settled law is later overturned.

Bergquist is not, however, a "solid wall of Circuit authority" regarding the mental state sufficient to find failure-to-train liability. Although in Bergquist we did hold that a policy of gross negligence in training could give rise to a claim for section 1983 liability, we said that "[t]he Supreme Court expressly reserved the question whether 'something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.'" Bergquist, 806 F.2d at 1370 (quoting Daniels v. Williams, 474 U.S.

327, 334 n.3 (1986)). The Supreme Court subsequently answered this question in City of Canton. In Bergquist, by saying that the question was left open by the Supreme Court, we clearly indicated that the state of mind sufficient to find failure-to-train liability was not a settled point of law. Thus, the Robinson exception for waiving objections does not apply to the issue in this case. Mason County, having failed to object to the jury instruction, lost the right to raise this issue on appeal. Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Sys., Inc., 732 F.2d 1403, 1410 (9th Cir. 1984).

[7] Even if Mason County did object to the jury instruction regarding tile standard for municipal liability, we still would hold that the district court did not commit reversible error. "We

examine whether or not the instructions taken as a whole were misleading or represented a statement inadequate to guide the jury's deliberations." United States v. Kessi, 868 F.2d 1097, 1101 (9th Cir. 1989). The instructions given by the district court allowed the jury to find municipal liability only upon a showing of "reckless disregard" or "deliberate indifference." We do not find the court's instructions, taken as a whole, to be inconsistent with the "deliberate indifference" standard enunciated in City of Canton. In City of Canton, the Court stated that "the need for more or different training [may be] so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent." 489 U.S. at 390.

[8] Similarly, the district court in this case instructed that a person acts with reckless disregard when he "disregards a substantial risk that a wrongful act may occur of which he is aware, or which is so obvious that he must have been aware of it, and his disregard of that risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." (Emphasis added). The district court's definition of reckless disregard is effectively the same as the language cited from City of Canton; both allow a jury to impose municipal liability in failure-to-train cases for acts that so clearly violate the rights of an individual that the policymakers can be said to be deliberately indifferent.

In fact, after City of Canton, two circuits have suggested that 1983

liability may be imposed on a municipality if it exhibits a "reckless disregard" for an individual's constitutional rights. See D.T. v. Independent School Dist. No. 16, 894 F.2d 1176, 1192-93 (10th Cir.) ("[u]nder the standard [for] municipal liability] mandated by [City of Canton]...the evidence in this case is simply insufficient to demonstrate that the School District's policy reflected a reckless disregard or deliberate indifference") (emphasis added), cert. denied, 111 S. Ct. 213 (1990); Clipper v. Takoma Park, Maryland, 876 F.2d 17, 20-21 (4th Cir. 1989) (reaffirming the "deliberate indifference to or reckless disregard to" standard used in Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987), cert. denied, 484 U.S. 1027 (1988)). But see Calvert Ins. Co. v. Western Ins. Co., 874 F.2d 396, 400 n.5 (7th Cir.

1989) ("[a] recent Supreme Court case has held that an allegation of mere reckless failure to train does not state a cause of action against a municipality under § 1983").

C. Failure-to-train liability as a matter of law

[9] The jury instructions on this issue were nevertheless harmless because Mason County's failure to adequately train its deputies constituted deliberate indifference as a matter of law.

[10] The training that the deputies received was woefully inadequate, if it can be said to have existed at all. Sheriff Stairs himself never attended the State Training Academy and Undersheriff Harry "Bud" Hays had neither training nor experience. Although Washington law requires all police officers to complete academy

training within fifteen months of hire,[2] Deputy Sowers did not complete the academy until sixteen months after he was hired.

Instead of academy training, the Sheriff's Department devised a "field training program" for the officers. While this program may have seemed adequate on paper, in practice it was never followed. Indeed, one of the Department's two original field training officers, both of whom quit, called the program "a joke." The field training program was supposed to include tests, reports and, reviews by the field training officer and supervising sergeant on a periodic basis, yet there is no evidence that this was ever done. Although the program was supposed to last twelve months, in actuality it

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[2]Wash. Rev. Code § 43.101.200 (1990).

lasted only for a small fraction of that time.[3] One of plaintiffs' experts testified that as a result of the inadequacy of the field training program, the Department "sent officers out on the street to perform police services without any training whatsoever." The officers involved in these four incidents had received minimal or no training.

At the time of the Durbin incident (June 29, 1985), Sowers had not attended the State Academy. His only training besides minimal field training, which was cut short, consisted of the explorer cadets, a program in which teenagers with interest in law enforcement rode with officers. Deputy Quantz had received no training whatsoever prior to

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[3]Sowers received only three or four weeks in field training before he was sent out on patrol alone.

the Taylor incident (July 20, 1985).[4] Although Deputies Gardner and Ohlde had attended the State Academy prior to the Davis incident (July 28, 1985), Deputy Cribben had not. He had only received minimal police-type training in other contexts, such as a private security guard.

The issue is not whether the officers had received any training--most of the deputies involved had some training, even if it was minimal at best--rather the issue is the adequacy of that training. City of Canton, 489 U.S. at 390. More importantly, while they may have had some training in the use of force, they received no training in the constitutional limits of the use of force. The Supreme Court in City of

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[4]Although Taylor did not sue the Mason County, this fact is still relevant to show the County's practice in training its officers.

Canton declared: if "the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, ... the policymakers of the city can reasonably be said to have been deliberately indifferent to the need." Id. The Court went on to say in a footnote that "the need to train officers in the constitutional limitations on the use of deadly force can be said to be 'so obvious,' that failure to do so could properly be characterized as 'deliberate indifference' to constitutional rights." Id. at 390 n.10 (citation omitted).

[11] In the case at bar, the deprivation of plaintiffs' Fourth Amendment rights was a direct consequence of' the inadequacy of the training the deputies received. Mason

County's failure to train its officers in the legal limits of the use of force constituted "deliberate indifference" to the safety of its inhabitants as a matter of law.[5] Moreover, there was certainly more than enough evidence presented regarding the inadequacy of training in order to survive Mason County's motion for a directed verdict on the issue of municipal liability.

III. Whether the district court erred in various rulings related to the admission of evidence.

Defendants-appellants object to various of the district court's evidentiary rulings. A trial court has broad discretion in admitting and excluding expert testimony and its decisions will not be reversed unless "manifestly

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[5]Since we have found failure-to-train liability as a matter of law, there is no need to inquire into whether the two other grounds upon which plaintiffs state their claim--negligent hiring practices and failure to provide adequate supervision--subject the County to liability.

erroneous." Taylor v. Burlington N.R.R., 787 F.2d 1309, 1315 (9th Cir. 1986). Thus, its evidentiary rulings are reviewed for an abuse of discretion. Roberts v. College of the Desert, 870 F.2d 1411, 1418 (9th Cir. 1988). The admission or exclusion of evidence under Fed. R. Evid. 403 or 404 is reversible only for a clear abuse of discretion. Coursen v. A.H. Robins Co., 764 F.2d 1329, 1333, amended, 773 F.2d 1049 (9th Cir. 1985).

A. Testimony of Dr. Kevin Parsons

Mason County contends that the district court improperly excluded the testimony of one of their police experts, Dr. Kevin Parsons. A district court may exclude relevant, but cumulative evidence, because of "considerations of undue delay, waste of time, or needless presentation." Fed. R. Evid. 403. The court ruled that each side was

free to call two experts to the stand. Mason County argues that the testimony of their third witness, Dr. Parsons, was necessary, not cumulative, because he "brought a different level of expertise and experience to the topic." But the County admitted that Sheriff Jones testified for them on the "same topic." The district court therefore did not abuse its discretion by excluding Dr. Parson's testimony as cumulative evidence.

B. Testimony of Bryan Kelly and Mike Smith

Mason County maintains that the trial court erred in excluding the testimony of former Mason County deputies Bryan Kelly and Mike Smith regarding the Taylor arrest. However, the district court did grant the County's motion to include Kelly to its

witness list; Mason County never called Kelly.

Smith was not listed as a witness in the pretrial order, and it was not until late in the trial that Mason County moved to include him. Not only would Smith's testimony have been cumulative, Mason County offered no compelling reasons to add him. Fed. R. Evid. 403 gives the district court broad discretion in excluding cumulative evidence. See Hamling v. United States, 418 U.S. 87, 127 (1974). The district court did not abuse its discretion in excluding Smith's testimony.

C. Testimony on the James Davies incident

The day before the Davis/Gardner incident, there was an altercation between John Davis and James Davies. Davies, allegedly drunk and annoyed at being caught behind Davis' wagon,

attacked Davis' teenage son. In defending his son, Davis bloodied Davies' nose. Although Davis filed a police report reporting the incident, he did not press charges against Davies for initiating the attack, and the matter was dropped. Yet after the Davis/Gardner incident, the Sheriff's Department brought assault charges against Davis, who was acquitted in a jury trial.

Mason County sought to bring in evidence regarding this incident in order to show Davis' proclivity to violence. Fed. R. Evid. 404(b) says, however, that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." See Coursen v. A.H. Robins Co., Inc., 764 F.2d at 1335. The trial court did not abuse its

discretion in refusing to admit evidence of the Davies incident.

D. Testimony of Donald Van Blaricom

Mason County objected to plaintiffs' police expert, Donald Van Blaricom, because he testified that Sheriff Stairs was reckless in his failure to adequately train his deputies, and that there was a causal link between this recklessness and plaintiffs' injuries. They contend that this was improper opinion testimony on a question of law.

This argument is without merit. Fed. R. Evid. 704 allows expert witnesses to express an opinion on an ultimate issue to be decided by the jury. Northrop Architectural Sys. v. Lupton Mfg. Co., 437 F.2d 889, 891 (9th Cir. 1971). Moreover, Fed. R. Evid. 702 permits expert testimony comparing conduct of parties to the industry

standard. Vucinich v. Paine, Webber, Jackson & Curtis, Inc., 803 F.2d 454, 461 (9th Cir. 1986). The trial court did not abuse its discretion in admitting Van Blaricom's testimony.

IV. Whether there was sufficient evidence to support the findings of punitive damages in the amount assessed.

A jury may award punitive damages under section 1983 either when a defendant's conduct was driven by evil motive or intent, or when it involved a reckless or callous indifference to the constitutional rights of others. Smith v. Wade, 461 U.S. 30, 56 (1983). Moreover, plaintiff's inability to show compensable injury does not bar the award of punitive damages. Id. at 55 n.21.

Unless the amount of damages is grossly excessive, unsupported by the evidence, or based solely on specula-

tion, the reviewing court must uphold the jury's determination of the amount. Los Angeles Memorial Coliseum Comm'n v. Nat'l Football League, 791 F.2d 1356, 1360 (9th Cir. 1986), cert. denied, 484 U.S. 826 (1987).

Mason County makes four arguments regarding the amount of punitive damages awarded. First, Mason County argues that the punitive damages award should be stricken because there was insufficient evidence of any evil intent or motive. Second, the County contends that the jury should have been instructed that defendants' net worth should be considered in assessing punitive damages. Third, Mason County says that because remedial measures were taken, punitive damages were unnecessary. Finally, Mason County argues that since the jury awarded Rodius $0 in

compensatory damages, he should not have been awarded punitive damages.

A. Reckless or callous indifference

[12] Mason County's argument that the punitive damages award should be stricken because there was insufficient evidence of evil intent or motive is completely without merit because the alternative basis for assessing punitive damages is "reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. at 56. The jury could certainly infer that there was "reckless or callous indifference" based upon the evidence presented of the excessive force used.

B. Defendants' net worth

Plaintiff's concede that evidence of defendants' net worth would have been relevant in assessing punitive damages. However, Mason County did not offer this

evidence before the jury, and they did not object when the jury was not instructed on this issue. In order to preserve the issue on appeal, objections to jury instructions must be specific. Kopczynski v. The Jacqueline, 742 F.2d 555, 560 (9th Cir. 1984), cert. denied, 471 U.S. 1136 (1985). We will not consider the issue on appeal.

C. Remedial measures

[13] Mason County believes that the remedial measures taken rendered punitive damages unnecessary. Yet, they have failed to cite any Ninth Circuit case which supports this proposition. Further, punitive damages were assessed against individual defendants. The jury obviously felt that the punitive damages were necessary to deter future unlawful and egregious behavior on the part of the defendants. The jury's decision on this issue should stand.

D. Compensatory damages

[14] Rodius received $25,000 in punitive damages and $0 in compensatory damages. Mason County's argument that the jury erred in awarding punitive damages while not awarding compensatory damages fails. The Supreme Court has held that punitive damages may be available under Section 1983 where there has been a violation of constitutional rights even though the victim is unable to show compensable injury. Smith v. Wade, 461 U.S. at 55 n.21.

V. Whether there was sufficient evidence both to show that Broughton had been seized and to support his state law outrage claim.

The jury ruled that Broughton had bene illegally seized when Deputy Gardner's wife ordered him down from the hay wagon, and then took him by the arm and put him in the patrol vehicle. Mason County claims that there is

insufficient evidence to sustain the jury's verdict on this issue.

If the jury verdict is supported by "substantial evidence," the reviewing court must let it stand. "Substantial evidence" is admissible evidence that reasonable minds might accept as adequate to support a conclusion. Oltz v. St. Peter's Community Hosp., 861 F.2d 1440, 1450 (9th Cir. 1988); Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1014 (9th Cir. 1985), cert. denied, 474 U.S. 1059 (1986). If sufficient evidence is presented to a jury on a particular issue and if the jury instructions on the issue stated the law correctly, the court must sustain the jury's verdict. Transgo, 768 F.2d at 1014.

A. Jury instruction

The district court instructed the jury that "[a] person is seized within

the meaning of the Fourth Amendment whenever a police officer restrains his or her freedom to walk or drive away." This instruction stated the law correctly. Tennessee v. Garner, 471 U.S. 1, 7 (1985).

Moreover. there was certainly ample evidence from which the jury could infer that Deputy Gardner restrained Broughton's freedom to walk away. Broughton testified that he stayed on the wagon because he believed that Gardner would shoot. When Susan Gardner, the deputy's wife, ordered Broughton off the wagon and into the patrol car, he complied, thinking that she was a police officer as well. Broughton also testified that Susan Gardner forcibly took him by the arm and put him in the patrol car. From this evidence, it is clear that the jury could conclude that Broughton had been illegally seized.

B. Broughton's emotional distress claim

Although Mason County argues that Broughton cannot state a claim for emotional distress because he has not exhibited any objective symptoms of emotional distress, Washington law does not require physical manifestations in order to make an emotional distress claim. Contreras v. Crown-Zellerback, 88 Wash. 2d 735, 741 n.2, 565 P.2d 12173, 1176 n.2 (1977) (quoting Grimsby v. Samson, 85 Wash. 2d 52, 59, 530 P.2d 291, 295 (1975)).

Further, the jury had to evaluate defendants' behavior in this incident and determine whether it was so outrageous as to go beyond bounds of decency. Spurrel v. Bloch, 40 Wash. App. 854, 701 P.2d 529, 535, review denied, 104 Wash. 2d 1014 (1985). After hearing testimony from Dr. Beaton that

Broughton suffered from post-traumatic stress syndrome as a result of seeing his uncle bloodied by the deputies and having a gun pointed at him, the jury decided in the affirmative the fact question of whether the defendants' behavior was "so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community." Having so decided, the jury's verdict should stand.

VI. Whether the district court erred in calculating attorneys' fees.

A district court has broad discretion to grant attorneys' fees and costs. Thornberry v. Delta Air Lines, Inc., 676 F.2d 1240, 1242 (9th Cir. 1982), vacated on other grounds, 461 U.S. 952 (1983). We review its decision only for an abuse of discretion. Id. "Due to the trial

judge's familiarity with the litigation, review of the trial court's exercise of discretion in awarding attorneys' fees is narrow." Id.

Plaintiffs/appellees requested $575,658.13 in attorneys' fees and $99,201.63 in costs and expenses of litigation pursuant to the Attorney's Fees Awards Act of 1976. 42 U.S.C. § 1988. The district court awarded $4,348.57 in costs pursuant to 28 U.S.C. § 1920, and $249,588.00 in attorneys' fees and $69,623.08 in expenses of litigation under 42 U.S.C. § 1988. Mason County contests the award of expert witness fees, travel expenses, and attorneys' fees.

A. Expert witness fees

The district court granted $29,217.18 for plaintiffs' expert witnesses, the largest element of expenses awarded. Mason County argues that payment of expert witness fees as

expenses is precluded by the Supreme Court's decision in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). Crawford Fitting holds that "when a prevailing party seeks reimbursement for fees paid to its own expert witnesses, a federal court is bound by the limit of [28 U.S.C.] 1821(b), absent contract or explicit statutory authority to the contrary." 482 U.S. at 439.[6]

Plaintiffs originally contended that 42 U.S.C. § 1988 provides statutory authority for awarding expert witness fees greater than those allowed under 28 U.S.C. §§ 1821, a question left open in Crawford Fitting. See 482 U.S. at 455 (Blackmun, J., concurring) ("I join the Court's opinion and its judgment but upon the understanding that it does not

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[6]28 U.S.C. § 1821(b) limits witness fees to $30.00 per day.

reach the question whether, under 42 U.S.C. § 1988, a district court may award fees for an expert witness."). In our opinion filed March 12, 1991, we held that, consistent with the majority of circuit courts to consider the issue, section 1988 allows a prevailing plaintiff to recover reasonable expert witness fees regardless of the limits of 28 U.S.C. §§ 1821 and 1920.[7] But after

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[7]28 U.S.C. § 1920 reads:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal:

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case:

(3) Fees and disbursements for printing and witnesses:

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title.

the opinion was filed the Supreme Court in West Virginia University Hospitals, Inc., v. Casey, 59 U.S.L.W. 4180 (March 19, 1991), reached the opposite conclusion. The Court held that "[42 U.S.C.] § 1988 conveys no authority to shift expert fees." 59 U.S.L.W. at 4185.

[15] In their motion to modify our March 11, 1991 opinion, plaintiffs now concede that, under Casey, the district court's award of expert witness fees cannot stand. Under Casey, the district court may not use section 1988 as a basis to award expert witness fees in excess of the limits imposed by 28 U.S.C. § 1821 and 1920. We remand to the district court with instructions to modify the award of expert witness fees consistent with Casey.

B. Travel Expenses

Mason County contends that costs other than expert witness fees should

also be limited to those available under 28 U.S.C. § 1920. The only costs disputed below were travel expenses. Because this court will not consider issues not raised below, our review will be limited to travel expenses. See Amalgamated Clothing & Textile Workers Union v. Murdock, 861 F.2d 1406, 1420 (9th Cir. 1988).

Mason County fails to see that like the expert witness fees, the travel expenses were not granted as costs under section 1920, but rather as out-of-pocket expenses, compensable under section 1988. Courts have generally held that expenses incurred during the course of litigation which are normally billed to fee-paying clients should be taxed under section 1988. Dowdell v. City of Apopka, 698 F.2d 1181, 1190 (11th Cir. 1983); Palmigiano v. Garrahy, 707 F.2d 636, 637 (1st Cir. 1983);

Northcross v. Board of Educ., 611 F.2d 624, 639 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980). As the Eleventh Circuit said in Dowdell:

> Reasonable attorneys' fees under the [Attorney's Fees Awards] Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys. If these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must he borne by counsel, reducing the fees award correspondingly.

698 F.2d at 1190. Thus, following the reasoning adopted in upholding the award of expert witness fees, we also affirm the district court's award of travel expenses pursuant to section 1988.

However, it is unclear why the district court granted $12,845.25 for travel expenses as part of the $249,588.00 attorneys' fees, and $4,135.83 for travel expenses as part of the $69,623.08 award for expenses of litigation. Because the award of travel expenses may have been double counted, we remand on this issue.

C. Attorneys' fees

[16] Mason County disputes the amount awarded in attorneys fees. Specifically they question whether $135/hour accurately reflected the prevailing market rate in Western Washington. Further, they argue that the award should have been adjusted for billing judgment and reduced to the extent plaintiffs did not prevail on their claims for injunctive relief.

First, the hourly rate granted was reasonable for the Western District of

Washington. Plaintiffs submitted affidavits from the relevant community in support of their hourly fee request. Generally, the relevant community is one in which the district court sits. Polk v. New York State Dep't of Correctional Servs., 722 F.2d 23, 25 (2d Cir. 1983); Avalon Cinema Corp. v. Thompson, 689 F.2d 137, 140 (8th Cir. 1982). Western Washington is the relevant community here, for it is where the court is located and where three of plaintiffs-appellees' attorneys practice. The court did not abuse its discretion in setting the hourly fees based on the prevailing rates there.

Second, the court did not abuse its discretion in determining the amount of the award. The trial court used the "lodestar" method of calculation in addition to the twelve-factor analysis. The "lodestar" figure is simply the

multiplication of the number of hours reasonably expended by the reasonable hourly rate. Jordan v. Multnomah County, 815 F.2d 1258, 1262 (9th Cir. 1987). The twelve factors, as outlined in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) and in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975), cert. denied, 425 U.S. 951 (1976), include such considerations as the novelty of the case, the experience, reputation and ability of the attorneys, and the skill required to perform the legal service properly. After careful consideration of the twelve factors, the district court granted $249,588.00 in fees. There was no abuse of discretion.

Third, attorneys' fees should not be reduced to the extent that plaintiffs/appellees did not prevail on their

claims for injunctive relief. Plaintiffs submitted an affidavit which attested to the minute amount of time actually spent on the injunction claim. Mason County did not produce any evidence in support of their assertion that plaintiffs spent "much of their time" working on the issue of injunctive relief. Moreover, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.... In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit." Hensley v. Eckerhart, 461 U.S. 424, 435 (1983). There were excellent results in this case. The jury returned verdicts in favor of every plaintiff and against every defendant. Of the twenty basic verdicts in this

case, plaintiffs prevailed on eighteen. We affirm the amount awarded in attorneys' fees.

CONCLUSION

A jury found Mason County, its sheriff and several deputies liable under 42 U.S.C. § 1983, and awarded damages to five plaintiffs who were arrested without probable cause, beaten and then subjected to false criminal charges by Mason County deputies. We hold that Mason County's failure to adequately train its officers in the constitutional limits of the use of force constituted deliberate indifference to the safety of its inhabitants as a matter of law. The jury's verdict is sustained. In addition, we remand to the district court to determine the proper accounting of travel expenses for plaintiffs' attorneys and of expert witness fees.

AFFIRMED.

WALLACE, Chief Judge, concurring in part and dissenting in part:

I have no quarrel with the majority opinion, except for its affirming liability against Mason County. In 1959, the Washington legislature enacted a comprehensive civil service system for the employment of sheriffs' deputies, creating a commission with the authority to make personnel policy and review its implementation. Washington courts have since repeatedly held this system superior to any supposed rights of county sheriff's over their personnel.

Nevertheless, from a statute naming the county sheriff its chief law enforcement officer, the majority concludes he is also the final

policymaking authority for personnel training. The majority holds the entire civil service system irrelevant by inventing a distinction between "hiring" and "training," a distinction without basis in Controlling Washington state law. I disagree, and because the case against Mason County turns on this point, I respectfully dissent.

I.

The jury found that constitutional deprivations had been inflicted under the color of law, see 42 U.S.C. § 1983, and held liable the individuals involved. The jury also imposed liability on Mason County. Review of the county's liability, and the erroneous instructions that led to it, is the issue I address. We review jury instructions to determine "whether, considering the charge as a whole, the court's instructions fairly and

adequately covered the issues presented, correctly stated the law, and were not misleading." Thorsted v. Kelly, 858 F.2d 571, 573 (9th Cir. 1988).

Section 1983 does not impose vicarious municipal liability. Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986) (Pembaur). Direct municipal liability is extremely limited, and applies only "to acts that are, properly speaking, acts of the municipality that is, acts which the municipality has officially sanctioned or ordered." Id. at 480 (quotation omitted). A municipality is liable only if the tort was committed pursuant to a municipality's official policy. Id. at 479.

"The official policy requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to

action for which the municipality is actually responsible." Id. at 479-80 (quotation omitted) (emphasis in original). The official policy requirement is the focal point for recent cases which have considered the issue. It has been precisely defined by the Supreme Court to maintain appropriate limits on burgeoning municipal liability. The district court, in its instructions to the jury, ran afoul of these appropriate limits. The majority opinion, in its attempt to save these flawed instructions, threatens to blur the precise distinctions required by Supreme Court authority.

The identification of officials whose decisions represent official policy is a question of state law to be determined by the trial judge before the case is submitted to the jury. Jett v.

Dallas Independent School District, 109 S. Ct. 2702, 2723 (1989) (Jett). "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." Pembaur, 475 U.S. at 481 (plurality opinion); see also Jett, 109 S. Ct. at 2723.

Plaintiffs (collectively Davis) proceeded to trial against Mason County on a theory that the county had an official policy to hire, train, and supervise its deputy sheriffs inadequately. Davis argued that the county sheriff was the final policymaking authority for personnel. Consequently, he argued, the sheriff's personnel decisions constituted official county policy, on which Mason County liability could be pegged.

The district court adopted Davis's theory in its jury instructions. "The Sheriff of Mason County is the chief law enforcement officer of that county and a policymaking official for the Mason County Sheriff's Office." The majority has attempted to save this instruction by reference to Wash. Rev. Code Ann. § 36.28.010 (West Supp. 1990) ("The sheriff is the chief executive officer and conservator of the peace of the county."). Relying solely upon this statute, the majority holds that "[a]s chief executive officers, sheriffs possess final authority with respect to the training of their deputies, and thus it may be fairly said that their actions constitute county policy on the subject." Maj. op. at 5671.

The reality is decidedly more complex. The sheriff may be "chief executive officer and conservator of the

peace" but he is profoundly not the final authority for personnel administration. Final authority for personnel administration does not rest with the county sheriff: rather it rests with the civil service commission (Commission), pursuant to Wash. Rev. Code Ann. § 41.14 (West 1964 & Supp. 1990). The Commission's extensive powers and duties include the making of rules and regulations about examinations, appointments promotions, transfers, reinstatements, demotions, suspensions, and discharges, and which "may also provide for any other matters connected with the general subject of personnel administration." Wash. Rev. Code Ann. § 41.14.060(1) (West Supp. 1990).

"Implicit in the statutory scheme is the legislative intent to circumscribe the county sheriffs previously

unbridled discretion in personnel matters." Fezzey v. Dodge, 33 Wash. App. 247, 249, 653 P.2d 1359, 1361 (1982). "A full reading of [Wash. Rev. Code Ann. §] 41.14 reveals that in its enactment the legislature intended to preempt the coverage by county personnel systems of deputy sheriffs' selection, promotion and termination." Clallam County Deputy Sheriff's Guild v. Board of Clallam County Commissioners, 92 Wash. 2d 844, 847, 601 P.2d 943, 946 (1979) (en banc).

The majority attempts to discount the policymaking authority of this broadly empowered Commission by isolating a portion of Davis's theory at trial and hanging the entire case on it. The majority argues that liability arises solely from a failure of training and not from any other aspect of personnel administration. Maj. op. at 5672. Of

course, the majority is entitled to tailor its opinion as it sees fit, but it cannot alter state law or recent Supreme Court authority to match these developed contours.

It appears to me that the majority itself loses sight of its distinction. In a later section of its opinion, the majority simply asserts: "Since we have found failure-to-train liability as a matter of law, there is no need to inquire into whether the two other grounds upon which plaintiffs state their claim -- negligent hiring practices and failure to provide adequate supervision - subjected the County to liability." Maj. op. at 5678 n.5. In fact, the majority cannot so inquire, because to do so would undermine its theory of final policymaking authority, which depends on the absence of these other grounds. A few pages

before, this distinction was crucial. Maj. op. at 5673. I have no explanation for this inconsistency.

Washington state law does not suggest a distinction between "hiring" and "training" for the purposes of final policymaking authority. In order to save Davis's case, the majority treats Washington law as if it said "the Commission may make rules and regulations about any matters connected with the general subject of personnel administration, except training." This, I respectfully suggest, it cannot do. Absent a state law basis for its distinction, and the majority does not propose one, both hiring and training are properly included within the general subject of personnel administration," over which the Commission has final policymaking authority. Wash. Rev. Code Ann. § 41.14.060(1) (West Supp. 1990).

This is true, even if the sheriff actually hires or even trains his personnel, as recent Supreme Court authority makes clear. In Pembaur, two deputy sheriffs forcibly entered Pembaur's clinic to serve subpoenas on clinic employees. The deputies acted at the express direction of the county sheriff and an assistant prosecutor. The Supreme Court reversed the appellate affirmance of the district court's dismissal of Pembaur's section 1983 claim against the county. In doing so, the plurality was careful to distinguish the situation before us.

> Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the

> official policymaker, would give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis for county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff exercised that discretion in an unconstitutional manner; the decision to act unlawfully would not be a decision of the Board.

475 U.S. at 483 n.12 (plurality opinion) (emphasis added). Thus, final authority with regard to law enforcement is irrelevant to a claim alleging a failure of personnel policy. The statement from Pembaur, as well as logic and common sense, makes this clear. Moreover, the actual exercise of discretion in hiring or training cannot change the locus of final policymaking authority, which is fixed by state law.

This last point is poignantly illustrated by another recent Supreme

Court case, City of St. Louis v. Praprotnik, 485 U.S. 112 (1988). Praprotnik was transferred from one city agency to another and was then laid off. The jury found that the transfer and layoff had been retaliatory for Praprotnik's exercise of his first amendment rights. The jury exonerated the individual defendants and held the city liable.

The Supreme Court reversed the determination of municipal liability. The court of appeals in Praprotnik, like the majority here, held that Praprotnik's immediate supervisors had final authority with regard to his employment. Id. at 117. Seven of the eight Justices considering the case disagreed with this contention. "To the contrary, the City Charter expressly states that the Civil Service Commission has the power and the duty [to consider

and determine all personnel matters]." Id. at 129 (O'Connor, J.) (plurality opinion) (bracketed material in place of statutory language); see also id. at 132 (Brennan, J.) (plurality opinion).

Following Praprotnik, it matters not whether the sheriff actually hired or even trained his personnel. These acts are irrelevant to the locus of final policymaking authority. As I have already said, the issue turns solely on Washington law, which empowers the Commission with final policymaking authority over the entire subject of personnel administration. See Jett, 109 S. Ct. at 2723; Wash. Rev. Code Ann. § 41.14.060(1) (West Supp. 1990). Washington law does not distinguish between hiring and training, or between training and any other aspect of personnel administration, in its definition of Commission powers.

As directed by Praprotnik and Pembaur, and required by Washington state law, I would therefore hold that the Mason County sheriff is not a final decisionmaking authority with regard to "hiring" or "training" deputy personnel. This holding would require reversal as to Mason County, eliminating the need to consider the district court's second dispositive error. Since the majority both reaches and erroneously decides this issue, however, my discussion necessarily continues.

II

The district court instructed the jury to find liability against Mason County if the county acted with "thoughtless disregard" or "reckless disregard." This is not the law. City of Canton v. Harris, 109 S. Ct. 1197 (1989) (Canton), holds that a municipality will be liable "only where the

failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." Id. at 1204 (emphasis added).

Canton requires the jury to find an element of deliberateness; the district court's instructions did not. Thus, I would hold that the instructions and Canton are irreconcilable. The majority nevertheless attempts to save these erroneous instructions by overlooking the differences in language and by contending that, in any event, Mason County waived its objection.

The district court gave its instructions in apparent reliance upon Bergquist v. County of Cochise, 806 F.2d 1364 (9th Cir. 1986), since Bergquist was the law of this circuit at the time those instructions were given. Bergquist held that municipal liability for a failure to train required no more

than gross negligence. Id. at 1370. Subsequent to trial, however, the Supreme Court decided Canton, overruling Bergquist and requiring no less than a showing of deliberate indifference. See 109 S. Ct. at 1204 & n.7.

The majority contends that by not anticipating Canton, and by not objecting to the Bergquist instruction at trial, the County waived the Canton objection even though Canton was subsequently decided.

"No exception is required when it would not have produced any results in the trial court because 'a solid wall of Circuit authority' then foreclosed the point." Robinson v. Heilman, 563 F.2d 1304, 1307 (9th Cir. 1977), quoting United States v. Scott, 425 F.2d 55, 57 (9th Cir. 1970) en banc). This rule protects the parties and district court from the burden of countless objections

to previously decided points of law on the hope they may someday be changed.

The majority concedes as much. It argues, however, that Bergquist is not "a solid wall of Circuit authority." The majority states

> [a]lthough in Bergquist we did hold that a policy of gross negligence in training could give rise to a claim for section 1983 liability, we said that "[t]he Supreme Court expressly reserved the question whether 'something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.'" The Supreme Court subsequently answered this question in City of Canton. In Bergquist, by saying that the question was left open by the Supreme Court, we clearly indicated that the state of mind sufficient to find failure-to-train liability was not a settled point of law.

Maj. op. at 2611-12 (citations omitted). My reading of Bergquist is different. Bergquist observes the question left open by the Supreme Court and then

proceeds to decide it. Its decision settled the point for this circuit and for the district courts within it, until overruled by Canton.

It is pointless to debate how "settled" the issue was within the circuit. At the time of trial, Bergquist was authority directly on point. The argument in this circuit was over. The district court instructions properly conformed to Bergquist -- an objection would be useless. Thus, the Canton objection was not waived.

At best the majority's analysis shows that Bergquist was not a solid wall of Supreme Court authority. Indeed it was not. But Robinson does not require Supreme Court authority, nor should it. Robinson specifically refers only to a circuit wall. From the perspective of the district courts, for which the Robinson rule was announced,

Ninth Circuit precedent is as controlling as that from the Supreme Court.

Should we adopt a rule waiving objections to adverse Supreme Court precedent while requiring those to mere Ninth Circuit precedent? This distinction makes no sense to me. The district court must follow both: an objection to either will be ineffectual at trial. Robinson announced a bright-line rule to minimize the delay and confusion of needless trial objections. The majority opinion obliterates it.

Perhaps the majority signals discomfort with its waiver theory by providing an alternative. Assuming the Canton objection was not waived, the majority contends that the erroneous instructions were harmless error. This is so, the majority argues, because the county's training policy was inadequate as a matter of law. Maj. op. at 5676.

Surprisingly, this contention is unaccompanied by an articulation of the relevant standard of review. Indeed, it is difficult to discern the authority by which it can be made. The majority cites Canton, but Canton remanded the precise question the majority now keeps for itself. 109 S. Ct. at 1207.

As I have already discussed, Canton requires findings that (1) a county official with final decisionmaking authority (2) acted with deliberate indifference in adopting a policy that (3) caused the tort to occur. Id. at 1204-06. These elements impose an extraordinarily high burden on Davis, a burden rendered especially unamenable to appellate disposition by Canton's emphasis on its innate fact-dependency. See id. at 1206.

The majority nevertheless states that the deputies "received no training

in the constitutional limits of the use of force," maj. op. at 5676, and imposes county liability on this basis. Of course the deputies received training; the majority opinion itself recounts the training practices to discount their adequacy. Maj. op. at 5676. The majority's attempt to reconcile this contradiction highlights the difficulty with its premise. The majority asserts that while training did occur, it did not cover the "constitutional limits of the use of force." Maj. op. at 5676. This is an interesting way to define the issue, but one on which the record is utterly silent; my review of the record reveals absolutely no evidence at this level of detail, and the majority offers none. The absence of proof cannot be properly charged against the county, as the majority has done. Davis has the

burden here. See Canton, 109 S. Ct. at 1206.

Ultimately, the entire inquiry misses the mark. Even if the absence of evidence could be properly held against the county, which of course it cannot, it would be irrelevant to the questions of authority and deliberation necessary for a finding of a Mason County policy, and to the question of causation.

> [The] rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible. That much may be true. The issue in a case like this one, however, is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy."
>
> ...
>
> Moreover, for liability to attach in this circumstance

> the identified deficiency in a city's training program must be closely related to the ultimate injury.

Id. at 1205-06. I have already discussed the elements of authority and deliberation, neither of which is present here. As for causation, the majority addresses this element only long enough to assert that it has been met. Maj. op. at 5677. By what authority does the majority justify this conclusion? No reliance can be placed on the jury's findings, for the jury considered causation in a much broader context. At trial Davis offered to link his injury to inadequate hiring, training, and supervision. Based on the instructions given, the jury might easily have found causation only as to supervision or only as to hiring. On appeal, however, the majority has stripped from this theory both hiring

and supervision, leaving only training for which it imposes liability. Whatever else might be said, this much is absolutely clear: We have no jury finding in this case linking Davis's injury to "inadequate training in the constitutional limits of force." Therefore, at the very least, the majority should remand the case for a new trial on this question. As it now stands, the majority apparently finds this fact for itself. This, I suggest, it cannot do.

III

The jury found the conduct of the deputy sheriff's completely unacceptable. It is thus tempting to fashion a theory imputing liability to Mason County, but the law requires we resist this temptation. The allure is to find some sure means of financial recompense for the torts that were committed, but

that allure cannot be indulged here consistent with section 1983. The law imposes municipal liability only for torts caused by municipal policies adopted by persons with final decision-making authority, after some element of deliberation. The law requires plaintiffs to prove each of these elements by a preponderance of the evidence.

The jury instructions at issue failed to follow the law. As a consequence, Davis was not required to meet his burden of proof, and the jury was unable to consider properly the claim of Mason County liability.

The majority attempts to save these erroneous instructions by contracting the scope of Washington's system of civil service and by contending that much of Mason County's case on appeal was waived during trial. The majority

then completes its work by deciding the case against the county as a matter of law. For these reasons, I respectfully dissent from the holding affirming liability against the county.

APPENDIX B

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX C

RCW 41.14.030. Civil service commission -- Appointment, terms, qualifications, compensation, etc.

There is created in each county and in each combination of counties, combined pursuant to RCW 41.14.040 to carry out the provisions of this chapter, a civil service commission which shall be composed of three persons. The commission members shall be appointed by the board of county commissioners, or boards of county commissioners of each combination of counties, within sixty days after December 4, 1958. No person shall be appointed to the commission who is not a citizen of the United States, a resident of the county, or one of the counties combined, for at least two years immediately preceding his appointment,

and an elector of the county wherein he resides. The term of office of the commissioners shall be six years, except that the first three members of the commission shall be appointed for different terms, as follows: One to serve for a period of two years, one to serve for a period of four years, and one to serve for a period of six years. Any member of the commission may be removed from office for incompetency, incompatibility, or dereliction of duty, or malfeasance in office, or other good cause: Provided, That no member of the commission shall be removed until charges have been preferred, in writing, due notice, and a full hearing had. Any vacancy in the commission shall be filled by the county commissioners for the unexpired term. Two members of the commission shall constitute a quorum and the votes of any two members concurring

shall be sufficient for the decision of all matters and the transaction of all business to be decided or transacted by the commission. Confirmation of the appointment of commissioners by any legislative body shall not be required. At the time of appointment not more than two commissioners shall be adherents of the same political party. No member after appointment shall hold any salaried public office or engage in county employment, other than his commission duties. The members of the commission shall serve without compensation.

APPENDIX D

RCW 41.14.060. Powers and duties of commission

It shall be the duty of the civil service commission:

(1) To make suitable rules and regulations not inconsistent with the provisions hereof. Such rules and regulations shall provide in detail the manner in which examinations may be held, and appointments, promotions, reallocations, transfers, reinstatements, demotions, suspensions, and discharges shall be made, and may also provide for any other matters connected with the general subject of personnel administration, and which may be considered desirable to further carry out the general purposes of this chapter, or which may be found to be in the interest of good personnel administration. The

rules and regulations and any amendments thereof shall be printed, mimeographed, or multigraphed for free public distribution. Such rules and regulations may be changed from time to time.

(2) To give practical tests which shall consist only of subjects which will fairly determine the capacity of persons examined to perform duties of the position to which appointment is to be made. Such tests may include tests of physical fitness or manual skill or both.

(3) To make investigations concerning and report upon all matters touching the enforcement and effect of the provisions of this chapter, and the rules and regulations prescribed hereunder; to inspect all departments, offices, places, positions, and employments affected by this chapter, and ascertain whether this chapter and all

such rules and regulations are being obeyed. Such investigations may be made by the commission or by any commissioner designated by the commission for that purpose. Not only must these investigations be made by the commission as aforesaid, but the commission must make like investigation on petition of a citizen, duly verified, stating that irregularities or abuses exist, or setting forth in concise language, in writing, the necessity for such investigation. In the course of such investigation the commission or designated commissioner, or chief examiner, may administer oaths, subpoena and require the attendance of witnesses and the production by them of books, papers, documents, and accounts appertaining to the investigation and also cause the deposition of witnesses residing within or without the state to

be taken in the manner prescribed by law for like depositions in civil actions in the superior court; and the oaths administered and the subpoenas issued hereunder shall have the same force and effect as the oaths administered and subpoenas issued by a superior court judge in his judicial capacity; and the failure of any person so subpoenaed to comply with the provisions of this section shall be deemed a violation of this chapter, and punishable as such.

(4) To conduct hearings and investigations in accordance with this chapter and by the rules of practice and procedure adopted by the commission, and in the conduct thereof neither the commission, nor designated commissioner shall be bound by technical rules of evidence. No informality in any proceedings or hearing, or in the manner of taking testimony before the commis-

sion or designated commissioner, shall invalidate any order, decision, rule, or regulation made, approved, or confirmed by the commission: Provided, That no order, decision, rule, or regulation made by any designated commissioner conducting any hearing or investigation alone shall be of any force or effect whatsoever unless and until concurred in by at least one of the other two members.

(5) To hear and determine appeals or complaints respecting the allocation of positions, the rejection of an examinee, and such other matters as may be referred to the commission.

(6) To provide for, formulate, and hold competitive tests to determine the relative qualifications of persons who seek employment in any class or position and as a result thereof establish eligible lists for the various classes of positions, and provide that persons

laid off, or who have accepted voluntary demotion in lieu of layoff, because of curtailment of expenditures, reduction in force, and for like causes, head the list in the order of their seniority, to the end that they shall be the first to be reemployed or reinstated in their former job class.

(7) To certify to the appointing authority, when a vacant position is to be filled, on written request, the names of the three persons highest on the eligible list for the class. If there is no such list, to authorize a provisional or temporary appointment list for such class. Such temporary provisional appointment shall not continue for a period longer than four months; nor shall any person receive more than one provisional appointment or serve more than four months as provisional appointee in any one fiscal year.

(8) To keep such records as may be necessary for the proper administration of this chapter.

APPENDIX E

RCW 41.14.070. Classified and unclassified service designated -- Procedures

The classified civil service and provisions of this chapter shall include all deputy sheriffs and other employees of the office of sheriff in each county except the county sheriff in every county and an additional number of positions, designated the unclassified service, determined as follows:

Staff Personnel	Unclassified Position Appointments
1 through 10	2
11 through 20	3
21 through 50	4
51 through 100	5
101 and over	6

The unclassified position appointments authorized by this section must include selections from the following

positions up to the limit of the number of positions authorized: Undersheriff, inspector, chief criminal deputy, chief civil deputy, jail superintendent, and administrative assistant or administrative secretary. The initial selection of specific positions to be exempt shall be made by the sheriff, who shall notify the civil service commission of his selection. Subsequent changes in the designation of which positions are to be exempt may be made only with the concurrence of the sheriff and the civil service commission, and then only after the civil service commission has heard the issue in open meeting. Should the position or positions initially selected by the sheriff to be exempt (unclassified) pursuant to this section be under the classified civil service at the time of such selection, and should it (or they) be occupied, the employee(s)

occupying said position(s) shall have the right to return to the next highest position or a like position under classified civil service.

The legislative authority of any class AA county operating under a home rule charter may designate unclassified positions of administrative responsibility not to exceed twelve positions.

APPENDIX F

IN THE UNITED STATES
DISTRICT COURT WESTERN DISTRICT
OF WASHINGTON AT TACOMA

JOHN DAVIS; WAYNE BROUGHTON, a minor through his guardian and mother Sharon Broughton; DOUG DURBIN; ED RODIUS; KEN SOLENE; SHANE SOLENE, a minor, through his guardian and mother, Linda Solene; and DON TAYLOR,	)	
Plaintiffs,	)	
vs.	)	NO. C86-485TB
MASON COUNTY; MASON COUNTY SHERIFF'S DEPARTMENT; NAT STAIRS, in his capacity as Mason County Sheriff and as an individual, and JANE DOE STAIRS, his wife, and the marital community composed thereof; PETE CRIBBEN, in his capacity as a Mason County Deputy Sheriff and as an individual, and JANE DOE CRIBBEN,	)	MOTION TO SEVER CLAIMS

his wife, and the)
marital community)
composed thereof;)
JACK GARDNER, in)
his capacity as a)
Mason County Deputy)
Sheriff and as an)
individual, and)
SUSAN GARDNER, his)
wife, and the)
marital community)
composed thereof;)
GARRY OHLDE, in his)
capacity as a Mason)
County Deputy)
Sheriff and as an)
individual, and)
JANE DOE OHLDE, his)
wife, and the)
marital community)
composed thereof;)
DOUG QUANTZ, in his)
capacity as a Mason)
County Deputy)
Sheriff and as an)
individual, and)
JANE DOE QUANTZ, his)
wife, and the)
marital community)
composed thereof;)
and RAY SOWERS, in)
his capacity as a)
Mason County Deputy)
Sheriff and as an)
individual, and)
JANE DOE SOWERS, his)
wife, and the)
marital community)
composed thereof,)
)
Defendants.)
_____)

COMES NOW the defendants above named, by and through their attorneys of record, William J. Rush, of Rush, Hannula & Harkins, and Roy Umlauf of Williams, Kastner & Gibbs, and move this court for an order severing and bifurcating the claims of the plaintiffs herein from each other. This motion is based on Federal Rules of Civil Procedure 21 and 42(b), the files and records herein, and the defendants' memorandum of law in support of severance of the claims. Said files, records and memorandum demonstrate the plaintiffs' claims are diverse and pertain to separate incidences.

DATED this 28th day of May, 1987.

RUSH, HANNULA & HARKINS

By_____
William J. Rush

APPENDIX G

IN THE UNITED STATES
DISTRICT COURT WESTERN DISTRICT
OF WASHINGTON AT TACOMA

JOHN DAVIS; WAYNE BROUGHTON, a minor through his guardian and mother Sharon Broughton; DOUG DURBIN; ED RODIUS; KEN SOLENE; SHANE SOLENE, a minor, through his guardian and mother, Linda Solene; and DON TAYLOR,	)	
Plaintiffs,	)	
vs.	)	NO. C86-485TB
MASON COUNTY; MASON COUNTY SHERIFF'S DEPARTMENT; NAT STAIRS, in his capacity as Mason County Sheriff and as an individual, and JANE DOE STAIRS, his wife, and the marital community composed thereof; PETE CRIBBEN, in his capacity as a Mason County Deputy Sheriff and as an individual, and JANE DOE CRIBBEN,	)	MEMORANDUM OF AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO SEVER CLAIMS

his wife, and the)
marital community)
composed thereof;)
JACK GARDNER, in)
his capacity as a)
Mason County Deputy)
Sheriff and as an)
individual, and)
SUSAN GARDNER, his)
wife, and the)
marital community)
composed thereof;)
GARRY OHLDE, in his)
capacity as a Mason)
County Deputy)
Sheriff and as an)
individual, and)
JANE DOE OHLDE, his)
wife, and the)
marital community)
composed thereof;)
DOUG QUANTZ, in his)
capacity as a Mason)
County Deputy)
Sheriff and as an)
individual, and)
JANE DOE QUANTZ, his)
wife, and the)
marital community)
composed thereof;)
and RAY SOWERS, in)
his capacity as a)
Mason County Deputy)
Sheriff and as an)
individual, and)
JANE DOE SOWERS, his)
wife, and the)
marital community)
composed thereof,)
)
Defendants.)
_____)

Defendants, Mason County, et al., move this court for an order severing the claims of the plaintiffs. The factual circumstances raised in the plaintiffs' complaint reflect a number of divergent causes of action which arose out of unrelated dates, activities and events. The only common issue raised pertains to inadequate training upon which no discovery has been conducted. Plaintiffs' claims should be severed to prevent substantial prejudice from resulting to defendants in the hearing of each individual case. These circumstances establish the separateness of the plaintiffs' claims. Federal Rules of Civil Procedure 21 and 42 permit this Court to sever the claims of the plaintiffs.

I. FACTS

Ken and Shane Solene are alleged to have been stopped on January 15, 1985 by

Deputies Gardner and Cribben on Northshore Road in Mason County. Deputy Gardner allegedly stopped the vehicle suspecting that the driver was under the influence of alcohol. Plaintiffs allege failure to diagnose a diabetic condition. Plaintiffs Solene have no personal or direct knowledge of any of the other plaintiffs' claims.

On June 29, 1985, Deputy Ray Sowers stopped Doug Durbin on Elfandahl Pass Road. This incident involves issues of false arrest and assault. The allegations of this plaintiff are separate and distinguishable from the claims of the other plaintiffs. Different officers were involved and the incidents occurred on separate occasions. No direct knowledge of any of the other claims is known by this plaintiff.

Don Taylor was arrested on July 20, 1985 on Craig Road in Mason County. The

plaintiff and his wife were traveling on Craig Road when stopped by Deputy Quantz. This plaintiff alleges the same injuries as the other five plaintiffs. Yet it must be noted that each incident occurred on a different date and involved separate defendants and distinguishable facts. Again, Taylor has no knowledge of the other plaintiffs' claims.

On July 28, 1985, Mr. John Davis was driving his horse-drawn wagon down Sandhill Road with Wayne Broughton on the wagon. Deputy Jack Gardner made the initial stop with Deputies Cribben and Ohlde acting as backup. Again, Mr. Davis' claims are widely different from the rest of the plaintiffs and he has no personal knowledge of the separate claims of the other plaintiffs.

On March 15, 1986, Ed Rodius was stopped by Deputy Sheriff Sowers at the

intersection of Olympic Highway and West G Street in Shelton. The plaintiff Rodius has no personal or direct knowledge of any of the other of plaintiffs' claims in this action.

Although the plaintiffs make the same allegations concerning injuries to their person and civil rights, each plaintiff's complaint, arose out of unrelated activities and events on different days and involving different defendants. With regard to the negligent hiring and retention allegation, this is an allegation which involves each plaintiff and the corresponding defendant separately. The allegation, by its very nature, must be considered individually and separately from the claim of negligent hiring and retention alleged by the other plaintiffs. Plaintiffs have knowledge only of their own claims and not the claims of the

other five plaintiffs. Therefore, each plaintiff's claim should be separated into separate trials to avoid prejudice to the defendants and confusion to the jury.

II. BASIS FOR RELIEF REQUESTED

It is the moving defendants' position that it would be unfair and prejudicial to permit evaluation of the respective plaintiffs' civil rights and personal injury claims. Because the dates and factual circumstances involved are markedly different and because the claims arise out of different causes of action, it would be prejudicial to the defendants if the Court heard all of these claims together.

Separation of the different claims made by each of the individual plaintiffs will avoid prejudice to these moving defendants, and will not involve prejudice to the plaintiffs.

III. LAW AND LEGAL ARGUMENT

A. FEDERAL RULES OF CIVIL PROCEDURE 21 AND 42(b) PROVIDE THE TRIAL COURT WITH THE POWER TO ORDER SEPARATE TRIALS.

Federal Rules of Civil Procedure Nos. 21 and 42(b) govern severance of claims. Rule 21 states in pertinent part:

> Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Fed. R. Civ. P. 21.

The grounds for making such a motion are found in Civil Rule 42(b) under separate trials. The rule states in pertinent part:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials may be conducive to expedition and economy, may order a separate trial of any claim . . . or of any separate issue or any number of claims,

> . . . always preserving inviolate the right of trial by jury. . . .

B. THE FACTS OF THIS CASE ARE CLEARLY SUCH THAT THE ELEMENTS CONSIDERED IMPORTANT FOR A RULE 42(b) DETERMINATION ARE BEST SERVED BY GRANTING AN ORDER SEPARATING THE CLAIMS OF EACH PLAINTIFF FROM ONE ANOTHER.

FRCP 42(b) lists four possible justifications for bifurcated trial. Any one of these reasons is sufficient for such an order. Here, the primary basis for this request is the inherent prejudice to the defendants, should the plaintiffs be allowed to present cumulative evidence, which in great part is unrelated to each individual plaintiff's case.

There are nine plaintiffs in this lawsuit and fourteen named defendants. Each plaintiff has a claim against Mason County and the Mason County Sheriff's Department, in addition to a specific deputy sheriff. Each plaintiff's claim

arises out of a separate factual incident and each plaintiff has a separate cause of action against Mason County. For a jury to hear nine separate claimants come forward against the defendants alleging civil rights violations, personal injury claims and negligent hiring and retention that are clearly not relevant to the claims of the other plaintiffs involved, would create undue prejudice to these moving defendants and would prevent a fair trial of these claims.

The claim of each plaintiff should be separated to avoid this prejudice to the defendants, and to allow consideration of the facts related to each claim to be applied only to that specific plaintiff. If separation is not achieved, the jury would have too difficult a time deciding liability and

this would also affect the damages in each case.

Under Fed. R. Civ. P. 42(b), a trial court has discretion to order a separate trial or sever any claims or issues "in furtherance of convenience or to avoid prejudice." The trial court has broad discretion to sever claims or issues. Easton v. City of Boulder, Colorado, 776 F.2d 1441, 1447 (10th Cir. 1985).

Inherent in the trial court's exercise of discretion "is a desire to use the procedure most likely to result in a just, final disposition of the litigation." Civil Procedure, Friedenthal, Kane & Miller, § 6.2, p. 316 (1985). Severance of unrelated incidents into separate trials is especially important when the overlap of characters and events of the different claims presents the likelihood of jury

confusion. Hammons v. Adams, 786 F.2d 1253 (5th Cir. 1986).

The joint trial of the various unrelated claims and incidents will likely lead to jury confusion of the issues, parties, and incidents and would result in injustice and prejudice to defendants' ability to receive a fair and just resolution of the claims and allegations.

In addition, the legal issues involved in the various incidents and claims are dissimilar. For example, the resolution of the Solene claims will necessarily involve analysis of plaintiffs' claims of a diabetic condition. Resolution of these claims will necessarily involve medical testimony relating to diabetes and detection and treatment of the same. Such medical issues are unrelated to any of the other alleged claims or

incidents. In addition, the claims involving plaintiffs Taylor and Durbin involve covenants not to sue and releases which were executed by these plaintiffs. The liability and legal issues involved in these releases and covenants are not related to the other claims and incidents.

In the case before this court, separate trials of the individual plaintiffs' claims will avoid the prejudice that would necessarily result from a trial in which all the plaintiffs' differing and inconsistent claims would present to a jury. There would be no prejudice that would result to the individual plaintiffs from trying their individual claims separately and the moving defendants' motion for separate trials should be granted.

DATED this 28th day of May, 1987.
RUSH, HANNULA & HARKINS

By:_____
William J. Rush, Of
Attorneys for Defendants

WILLIAMS, KASTNER & GIBBS

By:_____
Roy A. Umlauf, Of
Attorneys for Defendants

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF
WASHINGTON AT TACOMA

JOHN DAVIS, et al.,	)	
	)	
Plaintiffs,	)	NO. C86-485TB
	)	
vs.	)	ORDER DENYING
	)	DEFENDANTS'
MASON COUNTY, et al.,	)	MOTION TO SEVER CLAIMS
	)	
Defendants.	)	
	)	

THIS MATTER comes before the Court upon motion brought by the defendants above named for an order to sever the claims of the plaintiffs. This motion is brought pursuant to Fed. R. Civ. P. 21 and 42(b).

The Court has considered the pleadings filed in support of and in opposition to said motion and hereby concludes that there is sufficient similarity in the facts of the

transactions and/or occurrences of the plaintiffs with the defendants and sufficient common questions of law which make it appropriate to try the claims of the plaintiffs together. Further, the defendants have failed to sufficiently show inconvenience and prejudice to support their position. For the foregoing reasons, it is hereby

ORDERED that defendants' Motion to Sever Claims is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 8th day of July, 1987.

ROBERT J. BRYAN
United States District
Judge

APPENDIX I

INSTRUCTION NO. 41

You are instructed that the laws of the State of Washington require Deputy Sheriffs, who are commissioned police officers, shall be hired based upon civil service rules. These rules are extensively set forth under the laws of the State of Washington.

Proposed, not given.

INSTRUCTION NO. 42

You are instructed that the general purpose of the civil service rules for Deputy Sheriffs is to establish a merit system of employment for County Deputy Sheriffs and other employees of the Office of County Sheriff.

RCW 41.14.010

Proposed, not given.

INSTRUCTION NO. 43

You are instructed that the powers and duties of the Civil Service Commission, relating to Deputy Sheriffs, in part, is as follows:

(1) To make suitable rules and regulations not inconsistent with the provisions hereof. Such rules and regulations shall provide in detail the manner in which examinations may be held, and appointments, promotions, transfers, reinstatements, demotions, suspensions and discharges shall be made, and may also provide for any other matters connected with the general subject of personnel administration, and which may be considered desirable to further carry out the general purposes of this chapter, or which may be found to be in the interest of good personnel administration. The rules and regulations and any amendments thereof shall be printed, mimeographed, or multigraphed for free public distribution. Such rules and regulations may be changed from time to time.

(2) To give practical tests which shall consist only of subjects which will fairly determine the capacity of persons examined to perform duties of the position to which appointment is to be made. Such tests may include tests of physical fitness or manual skill or both.

. . . . .

(6) To provide for, formulate, and hold competitive tests to determine the relative qualifications of persons who seek employment in any class or position and as a result thereof establish eligible lists for the various classes of positions, and provide that persons laid off because of curtailment of expenditures, reduction in force, and for like causes, head the list in the order of their seniority, to the end that they shall be the first to be reemployed.

RCW 41.14.060

Proposed, not given.

INSTRUCTION NO. 44

You are instructed that the laws of the State of Washington, relating to the Civil Service Commission, provide the qualifications of applicant for a position as follows:

> "An applicant for position of any kind under civil service must be a citizen of the United States who can read and write the english language."

Proposed, not given.

INSTRUCTION NO. 45

You are instructed that it shall be the duty of the Civil Service Commission regarding the appointment of deputies to:

(1) To make suitable rules and regulations not inconsistent with the provisions hereof. Such rules and regulations shall provide in detail the manner in which examinations may be held, and appointments, promotions, reallocations, transfers, reinstatements, demotions, suspensions and discharges shall be made, and may also provide for any other matters connected with the general subject of personnel administration, and which may be considered desirable to further carry out the general purposes of this chapter or which may be found to be in the interest of good personnel administration. The rules and regulations and any amendments thereof shall be printed, mimeographed, or multigraphed for free public distribution. Such rules and regulations may be changed from time to time.

(2) To give practical tests which shall consist only of subjects which will fairly determine the capacity of persons examined to perform duties of the position to which appointment is to be made. Such tests may include tests of physical fitness or manual skill or both.

. . . . .

(6) To provide for, formulate, and hold competitive tests to determine the relative qualifications of persons who seek employment in any class or position and as a result thereof establish eligible lists for the various classes of positions, and provide that persons laid off, or who have accepted voluntary demotion in lieu of layoff, because of curtailment of expenditures, reduction in force, and for like causes, head the list in the order of their seniority, to the end that they shall be the first to be reemployed or reinstated in their former job class.

(7) To certify to the appointing authority, when a vacant position is to be filled, on written request, the names of the three persons highest on the eligible list for the class. If there is no such list, to authorize a provisional or temporary appointment list for such class. Such temporary provisional appointment shall not continue for a period longer than four months; nor shall any person receive more than one provisional appointment or serve more than four months as provisional appointee in any one fiscal year.

RCW 41.14.060

Proposed, not given.

INSTRUCTION NO. 46

You are instructed that it shall be the duty of the Civil Service Commission regarding the filling of vacancies is as follows:

"Whenever a position in the classified service becomes vacant, the appointing power, if it desires to fill the vacancy, shall requisition the commission for the names and addresses of persons eligible for appointment thereto. Before a requisition can be made, the appointing authority shall give employees of the appointing authority who are in layoff status or who have been notified of an intended layoff an opportunity to qualify for any class within the office of the appointing authority. The commission shall certify the names of the three persons highest on the eligible list for the class to which the vacant position has been allocated, who are willing to accept employment. If there is no appropriate eligible list for the class, the commission shall certify the names of the three persons standing highest on the list held appropriate for such class. If more than one vacancy is to be filled an additional name shall be certified for each additional vacancy. The appointing power shall forthwith appoint a person from those certified to the vacant position.

To enable the appointing power to exercise a greater degree of choice in the filling of positions, no appointment, employment, or promotion in any position in the classified service shall be deemed complete until after the expiration of a period of one year's probationary service, as may be provided in the rules of civil service commission, during which the appointing power may terminate the employment of the person appointed, if during the performance test thus afforded, upon observation or consideration of the performance of duty, the appointing power deems such person unfit or unsatisfactory for service in the office of county sheriff. Thereupon the appointing power shall again requisition the commission for the names and addresses of persons eligible for appointment in the manner provided by this section and the person appointed in the manner provided by this section shall likewise enter upon said duties for the probationary period, until some person is found who is deemed fit for appointment, employment, or promotion whereupon the appointment, employment, or promotion shall be deemed complete.

RCW 41.14.130

Proposed, not given.

I-10

INSTRUCTION NO. 47

You are instructed that Mason County in 1985 and 1986 had in effect the following arrest procedure:

11.02.00

Deputies will not use more force than is necessary to make an arrest or to take a person into custody.

Mason county Policy Manual

Proposed, not given.

INSTRUCTION NO. 39

To prove Claim #1, violation of federal constitutional rights, each of the plaintiff have the burden of proving each of the following propositions against Mason County and Mason County Sheriff's Department:

1) that the conduct which violated a federal constitutional right was committed by a person acting under color of state law;

2) that the conduct violated rights protected by the United States Constitution and/or the laws of the United States;

3) that the violation of constitutional rights was proximately caused by Mason County's official policies regarding hiring, training, or supervision;

4) that said official policies were adopted and/or implemented with a reckless disregard for, or a deliberate indifference to, the rights of the citizens of Mason County;

5) that said violation of constitutional rights was a proximate cause of injuries and damages claimed by the plaintiff.

If you find from your consideration of all of the evidence that each of these propositions has been proved, your verdict should be for the plaintiff. On the other hand, if any of these propositions has not been proved, your verdict should be for the defendant.

INSTRUCTION NO. 40

"Official policy" in the legal sense is not limited to formal, written policies. It also means:

1. A policy statement or decision that is officially promulgated or made by the municipality's lawmaking officers or by a policy making official; or

2. A persistent, widespread practice of county employees, which, although not authorized by written policy, is so common and well settled as to constitute a custom that fairly represents county policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the county or to a policy making official.

Actions of officers or employees of a county do not render the county liable for violation of constitutional rights

unless they execute official policy as defined herein.

INSTRUCTION NO. 41

The Sheriff of Mason County is the chief law enforcement officer of that county and a policy-making official for the Mason County Sheriff's Office.

INSTRUCTION NO. 43

A person acts recklessly or with reckless disregard for the consequences when he disregards a substantial risk that a wrongful act may occur of which he is aware, or which is so obvious that he must have been aware of it, and his disregard of that risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

HON. ROBERT J. BRYAN

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

JOHN DAVIS; WAYNE BROUGHTON; DOUG DURGIN; ED RODIUS; and DON TAYLOR,	)	
Plaintiffs,	)	NO. C86-485TB
vs.	)	JUDGMENT IN A CIVIL CASE
MASON COUNTY; MASON COUNTY SHERIFF'S DEPARTMENT; PETE CRIBBEN, in his capacity as a Mason County Deputy Sheriff and as an individual; JACK GARDNER, in his capacity as a Mason County Deputy Sheriff and as an individual, and SUSAN GARDNER, his wife, and the marital community composed thereof; GARRY OHLDE, in his capacity as a Mason County Deputy Sheriff and as an individual; DOUG QUANTZ, in his capacity as a Mason County Deputy Sheriff and as an	)	

individual; and)
RAY SOWERS, in his)
capacity as a Mason)
County Deputy)
Sheriff and as an)
individual,)
)
Defendants.)
_____)

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED as follows:

A. Judgments in Favor of Plaintiffs

Judgment is entered:

1. In favor of plaintiff John Davis

a. Jointly and severally, against defendants Jack Gardner, Pete Cribben, Garry Ohlde and Mason County, in the amount of $150,000.00,

b. Jointly and severally against defendants Jack Gardner and

Mason County, in the amount of $25,000.00,

c. Individually against defendant Jack Gardner in the amount of $100,000.00,

d. Individually against defendant Pete Cribben in the amount of $75,000.00,

e. Individually against defendant Garry Ohlde in the amount of $50,000.00,

f. Individually against defendant Susan Gardner in the amount of $2,000.00.

2. In favor of plaintiff Wayne Broughton

a. Jointly and severally against defendants Jack Gardner and Mason County, in the amount of $10,000.00,

b. Individually against defendant Jack Gardner in the amount of

$10,000.00.

3. In favor of plaintiff Doug Durbin

a. Jointly and severally against defendants Ray Sowers and Mason County, in the amount of $5,000.00,

b. Individually against defendant Ray Sowers, in the amount of $25,000.00.

4. In favor of plaintiff Ed Rodius

a. Jointly and severally, against defendants Ray Sowers and Mason County, it the amount of $10,000.00,

b. Individually, against defendant Ray Sowers, in the amount of $25,000.00.

5. In favor of plaintiff Don Taylor, against defendant Doug Quantz, in the amount of $41,500.00.

B. Judgments in Favor of Defendants

Judgment is entered in favor of defendants Susan Gardner and Pete

Cribbin against plaintiff Wayne Broughton, and Wayne Broughton's claims against Susan Gardner and Pete Cribbin are hereby dismissed.

C. Statutory Costs and Attorneys' Fees

Statutory costs, and attorney's fees and costs pursuant to 42 U.S.C. §1988, in amounts to be determined by further order, are hereby awarded:

To plaintiff John Davis, from defendants Jack Gardner, Pete Cribben, Garry Ohlde, and Mason County,

To plaintiff Wayne Broughton, from defendants Jack Gardner and Mason County,

To plaintiff Doug Durbin, from defendants Ray Sowers and Mason County,

To plaintiff Ed Rodius, from defendants Ray Sowers and Mason County, and

To plaintiff Don Taylor, from defendant Doug Quantz.

D. Interest

Interest shall accrue at the amount of 12% per annum, compounded on all monetary amounts of the judgments against defendants set out above, from the date of the signing of this Order.

Interest shall accrue at the amount of 12% per annum, compounded on any amounts of costs and attorney 's fees awarded to plaintiffs by future order, from the date of the signing of that Order.

DATED: April 28, 1988.

Priscilla L. Miller, Deputy
Clerk of the United States
District Court

Approved and entered as final judgment this 18 day of April, 1988.

Robert J. Bryan
United States District Court
Judge

FILED
SEP 6 1991
OFFICE OF THE CLERK

No. 90-1931

IN THE
Supreme Court of the United States

October Term, 1991

MASON COUNTY; MASON COUNTY SHERIFF'S DEPARTMENT, et al.,

Petitioners,

v.

JOHN DAVIS; WAYNE BROUGHTON; DOUG DURBIN; ED RODIUS; and DON TAYLOR,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENTS

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BCD Legal Printers, Seattle, WA

QUESTIONS PRESENTED

1. Where the trial court found several incidents were factually related, in denying a pretrial motion to sever the plaintiffs' claims, and the defendants never moved to sever the claims against them and gained substantial advantages from the fact their cases were tried together, must an appellate court consider a motion by the defendants to sever the claims against them which is made for the first time on appeal?

2. Where, at trial, the defendants themselves argued for a "recklessness" standard of municipal liability, and did not object to the trial court's instructions which said the standard is "reckless disregard" or "deliberate indifference," defining both phrases in a manner consistent with City of Canton v. Harris, 489 U.S. 378 (1989), must an appellate court entertain an objection made for the first time on appeal, and reverse the municipal liability verdict?

3. Where state law makes the Sheriff "the chief executive officer" in rural counties, and the "appointing authority" for sheriffs' deputies, and gives him exclusive responsibility for deputies' training and supervision, subject only to civil service review of disciplinary action, is the sheriff a "policymaking official" with regard to the hiring, training and supervision of his deputies?

4. Where a Sheriff gives full police responsibilities to newly-hired deputies, without providing or requiring any training in limits on the use of force, even though he has received warnings and complaints about their propensity to abuse power, has he demonstrated deliberate indifference to the rights and safety of citizens?

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No. 90-1931

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

MASON COUNTY; MASON COUNTY SHERIFF'S DEPARTMENT, et al.,

Petitioners,

v.

JOHN DAVIS; WAYNE BROUGHTON; DOUG DURBIN; ED RODIUS; and DON TAYLOR,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

Respondents John Davis, Wayne Broughton, Doug Durbin, Ed Rodius and Don Taylor pray that the Court will not grant this Petition for a writ of certiorari.

JURISDICTION

Respondents do not dispute that the Court has jurisdiction over this case under 28 U.S.C. Section 1254(1).

PARTIES

In addition to the Petitioners Mason County and the Mason County Sheriff's Department, there were several individual defendants and appellants below, who have not joined in the Petition: Pete Cribben, Jack Gardner, Susan Gardner, Garry Ohlde, Doug Quantz, and Ray Sowers.

Mason County's insurer, Scottsdale Insurance Company, has a separate interest in this case, as it affects the pending lawsuit against the lawyers it retained to represent the defendants at trial. Rush, Hannula & Harkins v. Scottsdale Insurance Co., Pierce County Cause No. 89 2 01084 0.

STATE STATUTES INVOLVED

This case involves several Washington statutes, in addition to those set out in the Petitioners' Appendix, including RCW 36.28.010, 36.28.020, and 41.14.020, which are set out in Appendix A to this Brief.

STATEMENT OF THE CASE

The Petition does not fairly portray the facts underlying the jury's verdict and the Court of Appeals' decision below, regarding either the individual civil rights violations, or the Sheriff's Department policies that caused them.

1. The Civil Rights Violations

The Petition's summary descriptions of the incidents themselves are drawn from the testimony of the individual defendant deputies. Yet, as the District Court observed in its Order Denying A New Trial, "a disbelief of the individual defendants' testimony is inherent in the jury's verdict."

The Court of Appeals' summary of the incidents accurately reflects what the weight of the evidence showed, and the jury found. For the Court's convenience, we will repeat it here.

A. The Durbin Incident

Early on the morning of June 29, 1985 as Doug Durbin returned home from a local tavern, Deputy Ray Sowers followed him and waited outside of Durbin's home. Deputy Tom Furrer later arrived as backup. Sowers, flicking an electric stun gun on and off, ordered Durbin out of his house. Durbin, who complied, was arrested for drunk driving. After taking one step toward his house, the two deputies tackled Durbin and threw him to the ground. Though Durbin never attempted to resist, Sowers began to beat him on the back of his head with his fist. In the patrol car on the way to the jail Sowers slammed on the brakes, causing Durbin, who was handcuffed and thus defenseless, to smash into the screen with his face.[1]

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[1]Mr. Durbin's description of these events was confirmed by a report by Deputy Furrer which said that "Sowers was hitting Durbin about the head several times with his fist" while "Durbin ... was not or even attempting to resist" but "lying there ... and was not even talking." (On his Sergeant's instructions, Furrer wrote and filed a second report which left out this language.) After Deputy Furrer's original report became public, Sowers was given a reprimand which said he "use[d] too much physical force" and "used physical force on Mr. Durbin after he was under officer's control." Sowers also later admitted to a polygraph examiner for a subsequent employer that he had hit Mr. Durbin. He denied it in his testimony at trial, however.

Durbin was charged with driving while intoxicated [although his "breathalyzer test ... read .05, well below the legal definition of intoxication"], resisting arrest and obstructing an officer. Yet after Durbin signed a "Release and Satisfaction" against Mason County, the charges against him were dismissed.

B. The Taylor Incident

Deputy Doug Quantz pulled over Don Taylor as he was driving through Shelton on the afternoon of July 20, 1985, allegedly for driving too fast. Quantz ordered Taylor to spread-eagle against the patrol vehicle and proceeded to conduct a pat-down search. Under the guise of this search, Quantz twisted the skin on Taylor's arms and legs, struck him on the sides, hit him in the testicles, and slammed him against the side of the patrol car. Later, in the jail elevator, Quantz hit Taylor in the kidneys with his fist.[2]

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[2]Deputy Quantz's treatment of Mr. Taylor (who was himself a former police officer) was attested to by Mr. Taylor's wife, Nancy, and an independent witness who observed it from the yard of a nearby house. Based on the statements of the "approximately six" witnesses who gave a similar account, Mason County Prosecuting Attorney Gary Burleson testified that he decided to drop the resisting and obstructing charges even before Mr. Taylor signed a covenant not to sue.

After signing a "Partial Covenant Not to Sue," promising not to bring charges against Mason County, the charges against Taylor, including reckless driving, obstructing an officer, and resisting arrest, were dropped.

C. The Davis/Broughton Incident

John Davis and his fifteen year-old nephew, Wayne Broughton, were driving a loaded hay wagon drawn by a team of four horses on the afternoon of July 28, 1985. Because some cars were slowed behind the wagon, Deputy Jack Gardner came alongside the wagon in his patrol vehicle and, using his loudspeaker, ordered Davis to pull over. Davis lost control over the horses, who had been frightened by the noise of the loudspeaker. Gardner pulled in front of the wagon, took out his gun, pointed it at Davis and Broughton and threatened to shoot if they did not stop. As Davis got down from the wagon to attend to his horses, Gardner beat him on the legs with his nightstick and struck him on the head. He then knocked him down to the ground and continued to beat him. After Deputies Pete Cribben and Garry Ohlde arrived at the scene, all three hit him, kicked him, and shocked him with an electric stun gun. According to one witness, Davis "looked like he had been dipped in a bucket of blood" after the officers finished beating him.

Deputy Gardner's wife, who had been riding with him as a passenger and who was not an officer, ordered Broughton down from the wagon, and then took him by the arm and put him in the patrol car. After being questioned for an hour, Broughton was released.[3]

Davis was arrested and charged with felony assault, resisting arrest and obstructing an officer. The misdemeanor charges were dismissed, and a jury, which found that Davis was acting in self-defense, acquitted him of the felony charge.

D. The Rodius Incident

When Deputy Ray Sowers observed four young people talking between a car and a truck on the evening of March 15, 1986, he pulled over both vehicles. Sowers ordered Ed Rodius, a passenger in the truck, into the patrol car after he asked why they had been stopped. When Rodius refused to comply, Sowers jumped on Rodius, choked him, pulled on his hair, and then threw him to the

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[3]The assault on Mr. Davis and the arrest of Wayne Broughton was confirmed by several civilian witnesses whose cars were forced to stop by the collision between the hay wagon and Deputy Gardner's vehicle. Physical evidence supported these witnesses--particularly, Mr. Davis' injuries, which included head wounds that required over 115 stitches to close, and permanent brain damage, although the defendants denied inflicting any substantial blows to his head.

> ground and rubbed his face on the gravel of the parking lot.[4]
>
> Rodius was arrested and charged with possession of alcohol as a minor, purchasing liquor, and resisting arrest. Rodius was tried twice on the resisting arrest charge. The first trial resulted in a hung jury, and the second was declared a mistrial after the prosecution violated a motion in limine by referring to the case at bar in front of the jury. The Mason County Prosecutor's office eventually dismissed the charges.

Pet. App. A-14-19.

The Petitioners do not and cannot suggest that the evidence does not support this factual summary; there was no dispute about it among the majority and dissenting opinions below. There can be no question that, upon those facts, the jury could properly reach the judgments it did.

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[4]Mr. Rodius' description of Deputy Sowers' actions was corroborated by the other young people at the scene of his arrest and the clerk of a nearby convenience store.

2. The Sheriff's Policies

The Petition also ignores the record in its attempt to portray these events as "unrelated." Petition 8. Plaintiffs alleged and proved, and the jury found, that all of these incidents resulted from the policies of former Mason County Sheriff Nat Stairs.

All the incidents which gave rise to this case involved deputies hired in 1984 and 1985, after an increase in state funding. The hiring was done through a two stage process: a basic civil service screening, followed by a final selection by Sheriff Stairs himself.

Plaintiffs' expert Donald Van Blaricom testified that under the Stairs administration the procedures for informing the Sheriff's selection became "nonexistent or superfluous. There was no real effort to endeavor to learn what the background of these officers were."

The evidence overwhelmingly supported this conclusion.

Defendants Sowers, Quantz, and Cribben all had prior law enforcement related jobs--as an undercover informant, a prison guard, and a private security guard, respectively. However, none of their records from their prior employers were obtained during the hiring process. All three of them were examined by a police psychologist, Dr. John Berberich. As to all three Dr. Berberich made special recommendations that (if they were hired) special care be taken in their training, because of apparent personality problems. That recommendation was ignored; all three were given full patrol responsibilities, on their own, without attending the basic

police academy or even completing a field training program.[5]

Defendant Jack Gardner was accepted as a "lateral hire" from another department. Gardner had difficulties in both his prior police jobs. He was forced to resign from the Police Department of the City of Sumner, Washington, to avoid prosecution for theft--after the last of the four internal investigations he was subjected to there. Although the Mason County Sheriff's Department was alerted to this, Gardner's records were never obtained and the Sumner Police Chief was never contacted before Gardner was hired and

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[5]The statement in the Petition that "all the officers, except Sowers, were trained at the State police academy before the incidents occurred" (Pet. 7) is false. As the Court of Appeals noted, neither Cribben, Sowers nor Quantz had been to the academy at the time of the incidents in which they were involved. See Pet. App. A-40-41.

put out on patrol without any further training.

Training under the Stairs administration was wholly deficient. As noted above, newly hired deputies, including three of the defendants, were sent out on patrol without ever having attended the State police academy. The Department fashioned a paper "field training program" which was adequate on its face but was never followed. One of the Department's two original "field training officers"--both of whom resigned the position--called the field training program "a joke." As plaintiffs' expert testified: "they totally disregarded not only the industry standards, but their own policies and standards, and they sent officers out on the street to perform police services without any training whatsoever."

When the deputies' behavior resulted in citizen complaints, reports of their misconduct were suppressed or ignored. Sheriff Stairs announced publicly that only complaints sworn under oath would trigger an internal investigation. Although this deterred citizen complainants, written complaints still were made. But even when they were brought directly to the Sheriff himself, nothing was done.

The testimony at the trial below revealed this pattern: "Cover charges" of obstruction, resisting arrest, and the like, would be filed against persons subjected to police brutality. In many instances, these charges were then dropped in exchange for covenants not to sue the County. No internal investigation was ever conducted, despite

repeated complaints,[6] until public concern grew so great that a large community meeting was called and petitions were circulated demanding an end to police harassment.

After that meeting, the Sheriff publicly admitted he had failed to properly train and supervise his patrol officers, and claimed to have disciplined Ray Sowers for his treatment of Doug Durbin. The discipline turned out to be a sham.[7]

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[6]For example, the testimony revealed at least five incidents during Deputy Sowers' nine months on the job prior to the Durbin incident in which his conduct had resulted in citizen complaints, potential claims against the County, and/or the dismissal of criminal charges. No action was taken on any of them.

[7]Sowers was supposed to have received a "suspension". In fact, he only lost a few days of vacation time. In addition, Sowers' discipline was supposed to include counseling by Dr. Berberich. It never did; Sowers testified below that his superiors told him to ignore that part of the "disciplinary" order.

Two months after the Sheriff's announcement, a jury acquitted plaintiff John Davis of assaulting Deputy Gardner, and made a special finding (pursuant to Washington statute awarding attorneys fees) that Mr. Davis was acting in lawful self-defense. The Sheriff's Department took no action against Deputy Gardner. Two months later, Ray Sowers falsely arrested and beat up Ed Rodius. Shortly after that, in July, 1986, this lawsuit was filed.[8] In November, 1986, Mason County voters turned Sheriff Stairs out of office, electing a new Sheriff in his place.

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[8]The Complaint named as defendants Sheriff Stairs, as well as the County and the individual deputies. It also included two plaintiffs, in addition to those whose cases went on to trial: Ken Solene, and his son Shane.

The Solenes' claims for false arrest (against the County and Deputy Cribben) settled before trial. Sheriff Stairs died shortly after he left office, and the claim against his estate was voluntarily dismissed.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS PROPERLY REFUSED TO ORDER A NEW TRIAL ON THE BASIS OF A QUESTIONABLE SEVERANCE ARGUMENT WHICH WAS NEVER MADE IN THE DISTRICT COURT.

The Court of Appeals unanimously rejected two different severance arguments--one because it sought relief which was qualitatively different from what the defendants requested in the trial court, and the other because it found the trial judge acted within his discretion. See Pet. App. A-21-24. In this Court, Petitioners appear to renew only the first of these arguments, which they say the Court of Appeals "elevated form over substance in refusing to review ...." Petition 13.

Petitioners cite no authority from this Court or another federal Circuit which is inconsistent with the Court of Appeals' treatment of this matter. Nor do they suggest any significance it could have beyond this case.

We submit that, not only was the Court of Appeals' decision on this wholly case-specific, it was unquestionably correct. To make that clear requires some review of the procedural background against which its decision was made.

1. The Pretrial Motion to Sever the Plaintiffs' Claims.

At the start of this case, there were seven plaintiffs. Two of them, Ken Solene and his son, Shane, made a claim based on Mr. Solene's illegal arrests by Pete Cribben and another deputy in January, 1985. Mason County had a different insurance carrier at that time, so separate defense counsel was hired to represent Deputy Cribben and the County on the Solene claim.

Several months before trial, the two defense counsel jointly moved for an "order severing and bifurcating the claims of the plaintiffs herein from each other," citing FRCP 21 and 42(b). Pet.

App. F-3 (emphasis added). The supporting arguments were explicit and consistent on the result sought, which would have freed defense counsel in the Solene case from a joint trial involving the several other plaintiffs' claims.[9]

The District Court denied the motion. The Solene case settled, and the severance request was never renewed. The remaining claims went to a joint trial, with all the defendants represented by a single law firm.

The defense obtained substantial advantages from the fact the cases against them were tried together. For one thing, it greatly reduced the

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[9] See Defendants' Memo. Supporting Motion to Sever, Pet. App. G-7 ("each plaintiff's claim should be separated into separate trials"); id. at G-10 ("[t]he claim of each plaintiff should be separated"); id. at G-13 ("separate trials of the individual plaintiffs' claims will avoid the prejudice that would necessarily result from a trial in which all plaintiffs' differing and inconsistent claims would present to a jury"). (Emphasis added.)

required trial time and expenses. As it was, the case took 22 trial days. Separate trials would have taken several times as long, with an attendant increase in defense counsel's fees and expenses, and the defendants' exposure for plaintiffs' attorneys' fees under 42 U.S.C. § 1988.

The joinder of the cases also provided the defendants with important tactical advantages during trial. To rebut the claims against the County relating to hiring and supervision, defense counsel was able to present the jury with favorable information from the individual defendants' personnel files, a survey purporting to show that they rarely resorted to physical force,[10] and even expert testimony that (if their

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[10]This survey turned out to have left out a number of the incidents involving the use of force by these deputies, which were the subject of testimony and documents admitted at trial.

versions were believed) the defendant deputies had acted properly in each of the incidents which gave rise to this case. None of this would have been admissible in trials against the individual deputies alone.

The defendants apparently decided these advantages outweighed the disadvantages of a joint trial. At any rate, after the Solene case settled, they never again suggested to the District Court that the trials should be severed.

2. The Appellate Argument to Sever the Defendants.

When the case reached the Court of Appeals, new defense counsel made a wholly different severance argument: that the defendants were misjoined under FRCP 20(a). They press the same claim here. See Petition 10-11. The Court of Appeals rejected this argument because it was not made in the District Court. Pet. App. A-23.

The Petitioners contend that, by so ruling, the Court of Appeals "elevated form over substance." Petition 13. But the distinction between a request to sever plaintiffs and a request to sever defendants,[11] is no mere matter of form. If granted, these proposals would produce completely different results. The motion made in District Court asked for seven trials, one for each plaintiff (including the Solenes); the County and the Sheriff would have been involved in all seven trials, the deputies (except Cribben and

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[11]Misjoinder under FRCP 20(a) was never claimed in the defendants' pretrial motions or supporting arguments. Had it been, it would have availed the defendants little: for each individual defendant and the County were sued jointly for "the same transaction or occurrence," and the different individuals were sued for a "series of transactions or occurrences," and there were innumerable "question[s] of law or fact common to all defendants." The joinder of these cases was thus unquestionably proper. See United States v. Mississippi, 380 U.S. 128, 142-43 (1965).

Sowers) would each have been involved in only one. The argument made on appeal would have produced nine trials: all the plaintiffs (except Mr. Taylor) would have been jointly involved in two joint trials (one against the County and one against the Sheriff), in addition to one or more separate trials against the individual deputies. To suggest those results are equivalent ignores reality.

As the Court of Appeals noted, the severance of plaintiffs' claims the defendants requested in the District Court would not have solved the problem they now emphasize:

> Even if each plaintiff had a separate trial, evidence of a pattern of misconduct would still have been admitted because each plaintiff presented a claim against at least one defendant and against the County. Since defendants requested severance of the plaintiff's claims, the court below did not abuse its discretion in rejecting the motion.

Pet. App. A-23-24 (original emphasis).

Instead of granting a severance that would not solve this problem, the District Court gave careful limiting instructions to the jury, whenever evidence came in against one defendant that could not properly be considered against another, and at the end of the case.[12] This was fully consistent with the Rules and the law of every Circuit.

> Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 724 (1966).

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[12]There were at least seven instructions given during the course of trial, and at the submission of the case, clarifying such issues for the jury. The Petitioners have never challenged the sufficiency of those instructions.

The use of such limiting instructions is generally preferred to the more drastic remedy of severance. See, e.g., State of New York v. Hendrickson Brothers, Inc., 840 F.2d 1065, 1082-83 (2nd Cir. 1988).

There was no unfairness here. There were both advantages and disadvantages to conducting the trial jointly, for both sides. The District Court considered and properly rejected the only request made to it to separate the cases for trial. In the Ninth Circuit, and every other Circuit, such decisions are reviewed for abuse of discretion.[13] It could hardly be otherwise. Such questions involve myriad case-specific considerations only trial judges can fully assess and balance.

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[13]See Oregon Natural Resources Council v. U.S. Forest Service, 834 F.2d 842, 848 (9th Cir. 1987). Accord Gonzalez-Marin v. Equitable Life Assur. Soc., 845 F.2d 1140, 1145 (1st Cir. 1988); Idzojtic v. Pennsylvania Railroad Co., 456 F.2d 1228, 1230 (3rd Cir. 1972); Oman v. Johns-Manville Corp., 764 F.2d 224, 232 (4th Cir. 1985), cert. denied 474 U.S. 970 (1985); Jolley v. Welch, 904 F.2d 988, 994 (5th Cir. 1990); Easton v. City of Boulder, Colo., 776 F.2d 1441, 1447 (10th Cir. 1985), cert. denied 479 U.S. 816 (1986); Hendrix v. Raybestos-Manhatten, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985).

To permit a losing party to claim, on appeal, that a trial should have been configured differently than it proposed to the trial court, would eviscerate the trial judge's discretion and inject an intolerable uncertainty into all types of complex federal trials. The Court of Appeals' refusal to do that was unquestionably correct, and presents no issue warranting this Court's review.

II. THE DISTRICT COURT'S JURY INSTRUCTIONS ON MUNICIPAL LIABILITY --WHICH WERE NOT OBJECTED TO-- CORRECTLY ANTICIPATED THE STANDARD OF CITY OF CANTON V. HARRIS, 489 U.S. 378 (1989).

At the time of this trial in early 1988, there was an unresolved division among the Circuits regarding the standard by which a municipality could be held liable for improperly hiring, training or supervising its police officers. The standard in the Ninth Circuit was gross negligence. Hirst v. Gertzen, 676 F.2d 1252, 1256 (9th Cir. 1982).

Throughout the trial, defense counsel variously argued that gross negligence, recklessness, or deliberate indifference was the correct municipal liability standard.[14] The District Court instructed the jury on the higher of these standards: "reckless disregard for, or a deliberate indifference to, the rights of citizens." Pet. App. I-12. It defined these terms as follows:

> "Deliberate indifference" is an act or failure to act that is done with a callous indifference or thoughtless disregard of the consequences of one's action or failure to act on the rights of others.

Instruction No. 42.

> A person acts recklessly or with reckless disregard for the consequences when he disregards a substantial risk that a wrongful act may occur of which he is aware, or which is so

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[14] See Tr. 2471 ("recklessness or gross negligence"); Tr. 2486 ("at least gross negligence and probably recklessness"); Tr. 4079 ("gross negligence or deliberate indifference"); Def.'s Trial Brief at 27 ("gross negligence" [original emphasis]).

> obvious that he must have been aware of it, and his disregard of that risk is a gross deviation from the conduct that a reasonable person would exercise in the same situation.

Instruction No. 43, Pet. App. I-16. The defense took no exceptions to any of this language.

A year later, this Court resolved the division among the Circuits on this question by holding that municipal liability exists when a constitutional violation results from "deliberate indifference to the constitutional rights of" citizens, and rejecting the lesser standard of "gross negligence". City of Canton v. Harris, 489 U.S. at 388 n.7. The Court did not specifically address the validity of the "reckless disregard" standard the jury was alternatively given in this case.

If it were necessary to decide the issue here, we believe the Court would hold there is no significant distinction

between the phrases "deliberate indifference" and "reckless disregard." The dissenting opinion of Justice O'Connor in City of Springfield v. Kibbe, 480 U.S. 257 (1987)--which was a key of the foundation on which the majority built in City of Canton, see 489 U.S. at 385--used these terms interchangeably:

> In my view the 'inadequacy' of police training may serve as a basis for §1983 liability only where the failure to train amounts to a reckless disregard for or a deliberate indifference to the rights of persons within the city's domain.

480 U.S. at 268-69 (emphasis added). Accordingly, as Petitioners point out, the Circuits have generally held that "recklessness" is the equivalent of "deliberate indifference,"[15] as that

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[15]See, e.g., Wilks v. Young, 897 F.2d 896, 898 (7th Cir. 1990); Archuleta v. McShan, 897 F.2d 495, 499 (10th Cir. 1990); D.T. v. Independent School District No. 16, 894 F.2d 1176, 1192-94 (10th Cir.), cert. denied 111 S.Ct. 213 (1990); Clipper v. Takoma Park, Maryland, 876 F.2d 17, 20-21 (4th Cir. 1989).

phrase is used in City of Canton. This case does not turn on whether those courts are correct, however, for two reasons.

The first is the definition of "recklessness" given to the jury in this case. The jury was instructed that "reckless disregard" is disregard of "a substantial risk that a wrongful act may occur ... of which [the actor] is aware" which, in addition, is "a gross deviation" from reasonable conduct. Instruction No. 43, Pet. App. I-16. In the immediately preceding instruction, "deliberate indifference" was defined to the jury as "an act or failure to act that is done with callous indifference or thoughtless disregard of the consequences...." Only the most sophistic analyst could find a distinction between those definitions. Both captured the essence of the standard approved in City of Canton:

> that in light of the duties assigned to specific officers or employees the need for more or different training [was] ... so obvious, and the inadequacy so likely to result in a violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.

489 U.S. at 390.[16] Even if an unadorned instruction using the word "recklessness" would contravene City of Canton, these instructions did not.

The second reason that this case does not present this broader issue is the defendants' lack of objection to any of this language. In the Ninth Circuit, as elsewhere, the failure to object to a jury instruction waives the issue on

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[16]Plaintiffs' counsel made this clear in argument to the jury. "[W]e're talking about sheriff's decisions here regarding hiring, training, and supervision that was reckless, not just negligent. We have a higher standard; we have to show reckless. We have to show that he [sic] was a known danger that was ignored, and if that proximately caused the injuries to these plaintiffs, then the county is liable for the civil rights violation as well."

appeal.[17] Although the Ninth Circuit allows an exception where a "solid wall" of Circuit authority would make objection futile, plainly that was not the situation on this issue at the time of this trial, as the Court of Appeals correctly concluded. See Pet. App. A-33-34. Indeed, the existence of a longstanding split in authority on this question was the reason the Court undertook to answer it in City of Canton. 489 U.S. at 388 n.7. There was no reason the defendants could not have made this argument at the trial in 1988. Cf. Engle v. Isaac, 456 U.S. 107, 130-131 (1982).

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[17] Palmer v. Hoffman, 318 U.S. 109, 119 (1943); Goeken v. Kay, 751 F.2d 469, 474 (1st Cir. 1985); Levitt v. Desert Place, Inc., 601 F.2d 684, 686 (2nd Cir. 1979); Sims v. Mulcahy, 902 F.2d 524, 535-36 (7th Cir. 1990); Wilson v. Crouse-Hinds Co., 556 F.2d 870, 875 (8th Cir. 1977) (en banc), cert. denied 434 U.S. 968 (1977); Gilbert v. Jim Slemons Imports, Inc., 803 F.2d 1488, 1493 (9th Cir. 1986).

The District Court gave the defense the benefit of the doubt that existed on this issue at the time, and correctly anticipated this turn in the law. The defendants found nothing in that to complain about at the time, and the Court of Appeals correctly rejected their belated, technical complaint on appeal.

III. THE COURT OF APPEALS CORRECTLY DECIDED THAT UNDER WASHINGTON LAW THE SHERIFF OF A RURAL COUNTY IS THE POLICYMAKER CONTROLLING THE TRAINING OF HIS DEPUTIES.

One of plaintiffs' theories of municipal liability was that Mason County's official policies, as embodied in the actions and official statements of Sheriff Stairs, caused the plaintiffs' rights to be violated.[18]

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[18]Plaintiffs separately showed an unconstitutional municipal policy through the alternative means of establishing "the existence of a widespread practice that, although not authorized by written law or express municipal policy," is "so permanent and well-settled as to constitute a 'custom or usage' with the force of law." City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988).

The law governing such claims is well settled. Although municipalities are not vicariously liable for civil rights violations by most of their agents, liability may flow from the acts of "a lawmaker[] ... whose edicts or acts may fairly be said to represent official policy." Monell v. Department of Social Services, 436 U.S. 658, 694 (1978). "The identification of policymaking officials is a question of state law." City of St. Louis v. Praprotnik, 485 U.S. 112, 124 (1988).

Under Washington law, in smaller counties like Mason County,[19] "[t]he sheriff is the chief executive officer and conservator of the peace of the

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[19]Washington Constitution Article 11, Section 4 allows any county to adopt an alternative "Home Rule" form of government. In larger Washington counties the home rule charters generally make a County Executive the chief executive officer. E.g. King County Charter Article 3, §§ 310, 320. Smaller Washington counties such as Mason County have no similar executive officers.

county." RCW 36.28.010.[20] Washington sheriffs are constitutional, elected officials. Wash. Const. Art. 11, § 5. The sheriff is the "appointing authority," who selects deputies from lists of the three highest scoring applicants on civil service tests. RCW 41.14.060(7). The sheriff assigns duties and determines what training newly hired deputies receive before they "go out." Tr. 2024.[21] During the first year of employment, deputies may be terminated by the Sheriff at will. RCW 41.14.130.

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[20]Prior to 1965, this statute closed with a proviso that "[t]he county is not responsible for the acts of the sheriff." Former RCW 36.28.010 (1964). This proviso was removed in 1965. Washington Laws 1965, Ch. 2092 §1; see RCW 36.28.010 (1989 Supp.).

[21]RCW 43.010.200 requires that all police officers complete basic training at the state police academy within 15 months of the date they are hired. The statute contains no enforcement mechanism. It was violated by the Stairs Administration in the case of Ray Sowers, who attended the academy late, and Undersheriff Bud Hays, who never attended at all.

After one year, the sheriff's disciplinary actions which involve termination or suspension are subject to review by the county Civil Service Commission. RCW 41.14.120.

Washington statutes recognize that the power to deputize gives sheriffs the power to control their deputies. RCW 36.28.020. By statute and case law, they are liable on their bond for their deputies' misconduct. RCW 36.28.020; see Kusah v. McCorkle, 100 Wash. 318, 170 Pac. 1023 (1918). As the Mason County Sheriff's Department's Policy Manual states:

> The Sheriff is the Chief Executive of Mason County and of the Department. Upon him rests the final responsibility for determining policy. In his capacity as Chief Administrator of the department, the Sheriff maintains control and governs activity through executive officers who act in the advisory capacity in matters of general policy and procedures. The Sheriff shall have the power and authority to discipline employees of the department for non-compliance with rules, regulations, procedures and

> lawful orders issued by him or any superior officer. He may delegate whatever authority he deems necessary to ensure the maintenance of discipline within the department.

Mason County Sheriff's Office Policy Manual Section 4.01.01 (12/28/87). The testimony at trial bore this out: on issues regarding the hiring, training and supervision of their deputies, Sheriff Stairs answered to no other official or governmental body, except the electorate.

District Judge Robert Bryan was intimately familiar with this aspect of Washington law from his 17 years on the Superior Court bench in Kitsap County, Mason County's northerly neighbor. After reviewing these statutes and City of St. Louis v. Praprotnik, 485 U.S. 112 (1988), Judge Bryan instructed the jury as follows:

> The Sheriff of Mason County is the chief law enforcement officer of that county and a policy-making official for the Mason County Sheriff's Office.

Instruction No. 41, Pet. App. I-15. Judge Bryan's reference to the Sheriff as "the chief law enforcement officer" was derived from a defense proposed instruction which tracked the language of RCW 36.28.010, and said that the Sheriff was the "chief executive officer" of the County. Def. Proposed Instr. No. 40, Appendix B. However, the defendants objected to the statement that the Sheriff is "a policy making official," and to the court's refusal to give the jury their proposed instructions quoting Washington's civil service statutes.[22]

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[22]Defense counsel never directly argued at trial that these statutes made the Civil Service Commission the policy-making body for the Sheriffs' Department, as Petitioners apparently do now; he simply objected to so characterizing the Sheriff.

We submit those objections were properly overruled. As the statutes and policy statements set forth above make clear, the Sheriff has the real authority over his deputies. The county Civil Service Commission[23]--which is made up of three unpaid citizen appointees, RCW 41.14.030--has only two essential functions affecting sheriffs' deputies. It administers standardized Civil Service examinations to job applicants, and certifies to the Sheriff (the "appointing authority") the top three qualifiers. RCW 41.14.060(6). It also can investigate "whether the removal, suspension, demotion, or discharge" of a "person in the classified civil service" --which includes sheriffs' deputies employed more than one year--"was made in

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[23]Petitioner's reference to "The State Civil Service Commission" (Pet. ii, 19) is a misprint. Although there is a State Personnel Board in Washington State, it deals only with state employees. RCW 41.06.010; RCW 41.06.110.

good faith for cause." RCW 41.14.120. Neither of these functions approaches "policymaking" under Praprotnik.

The Commission's hiring function is narrowly circumscribed. Its tests are standardized and "practical." RCW 41.14.060 (2), (6). Their results are not binding: three names, not one, are certified by the Commission, "to give the sheriff a greater choice in appointing successful examinees." Fezzey v. Dodge, 33 Wn.App. 247, 251 n.1, 653 P.2d 1359 (1982). Moreover, "[t]o enable ... [the Sheriff] to exercise a greater degree of choice in the filling of positions," appointments are provisional for one year,[24] during which the sheriff "may terminate the employment of the person appointed" if he "deems such person unfit or unsatisfactory ...." RCW 41.14.130.

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[24]All but one of the incidents in this lawsuit involved deputies who had been employed for less than a year.

The Commission's role in decisions to dismiss classified employees is similarly secondary. The commissioners act in a quasi judicial, reviewing role. "'[T]hey are not given the power of either actual appointment or removal.'" In re Smith, 30 Wn.App. 943, 948, 639 P.2d 779 (1982), quoting Easson v. Seattle, 32 Wash. 405, 413, 73 Pac. 496 (1903).

> [A] civil service commission operating pursuant to RCW 41.14.120 must confine its inquiry to those reasons set forth by the appointing power. It may investigate those reasons but may not substitute reasons of its own ....

Ibid. Again, "the appointing power" is the Sheriff. RCW 41.14.020(2).

Petitioners overstate the cases by which they seek to portray the Civil Service Commission as a policymaking body. Fezzey v. Dodge, supra, arose under a previous statutory regime, which required the Sheriff to hire the single applicant certified to him by the

Commission. 33 Wn.App. at 251. The court in Fezzey did not hold even that older statute "preempt[ed] the county sheriff's discretion in personnel matters," as Petitioners' argue (Petition 17); what it said there was this:

> This statute affords applicants the fundamental right to fair competition and fair consideration for employment opportunities.... Implicit in the statutory scheme is the legislative intent to circumscribe the county sheriff's previously unbridled discretion in personnel matters.

33 Wn.App. at 250 (emphasis added, citation omitted). Clallam County Deputy Sheriff's Guild v. Commissioners, 92 Wn.2d 844, 601 P.2d 943 (1979), provides Petitioners even less support: all it held was that the state statute was "intended to preempt the coverage by county personnel systems of deputy sheriffs' selection, promotion and termination." 92 Wn.2d at 851. It said nothing about the division of responsibility among the County

officials--except to note that the power to set deputies' salaries, which was at issue in that case, "resides in the 'appointing power,' i.e., the county sheriff, with the consent of the board of county commissioners."[25] 92 Wn.2d 850.

Neither these nor any other Washington case law supports Petitioners' claim that the civil service laws have taken away from the Sheriff the power and duty to set policy for and about his deputies. Acceptance of that claim would work a radical transformation in county government and sheriff's departments throughout Washington. Although a broad reading of the catchall language of RCW 41.14.060(1), quoted by Judge Wallace in his dissent below (Pet. App. A-75), would suggest the Commission's rule making

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[25]The Board of County Commissioners is the legislative body in smaller counties in Washington State. RCW 36.32.005. It is wholly separate from the Civil Service Commission.

powers could be extended to reach the training and supervision of sheriff's deputies, no Washington case has ever recognized such authority--and so far as we know no county Civil Service Commission has ever claimed it. The law and custom in the State of Washington has always located such powers in the Sheriff.

We thus submit that the District Court and the Court of Appeals majority correctly applied Praprotnik to this particular area of this state's law. Judge Wallace's dissent shows that the point can be argued; but the District Court's instructions are consistent with the weight of state authority, and the common understanding, including that of officials in Mason County itself.[26]

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[26]The testimony below showed that all the relevant decisions regarding hiring, training, and supervision of Mason County deputies were personally made by Sheriff Nat Stairs. See, e.g., Tr. 1978, 2020-2026, 2037.

Even if the District Court was wrong on this, however, there is nothing here that calls for this Court's review. There was no disagreement below about what Pembaur and Praprotnik hold, or what the scope of municipal civil rights liability should be. The dispute was about some very specific provisions of the law of one state. The Court ordinarily defers to lower courts on such matters, because of their greater familiarity with local practice. Maynard v. Cartwright, 486 U.S. 356, 360 (1988); Edwards v. Aquillard, 482 U.S. 578, 609 (1987) (concurring opinion of Justice White). There is no reason to do otherwise here; and surely, the interpretation of one state's law is not an issue of sufficient national importance to justify this Court's attention.

IV. ON THE EVIDENCE IN THIS CASE, THE COURT OF APPEALS WAS JUSTIFIED IN ITS ALTERNATE CONCLUSION THAT MASON COUNTY'S FAILURE TO TRAIN ITS DEPUTIES IN THE LIMITS ON THE USE OF FORCE SHOWED DELIBERATE INDIFFERENCE TO CITIZENS' SAFETY.

Petitioners' last argument is difficult to respond to, because it is riddled with misrepresentations and exaggerations which undermine every one of its its factual predicates.

First, Petitioners say "[t]he official county policy, which the court refused to give as a jury instruction, is that officers use only reasonable force." Petition 19. The proposed jury instruction they point to is set out at Pet. App. I-10. It quotes from the policy manual of a previous Mason County Sheriff;[27] Sheriff Stairs never issued

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[27]As the instruction states, this part of the former manual does not use the term "reasonable" force, but says "Deputies will not use more force than is necessary to make an arrest ...." Pet. App. I-10.

any written policy on this subject.[28] The old manual was marked, but never offered into evidence at trial; and no witness testified about its "policy" statement. The defendants did not object to the District Court's refusal to give the instruction based on it at trial, and did not claim that as error in the appeal below.

Second, Petitioners say "Mason County followed state law in sending all officers to the State Police Academy" (Petition 19), harkening back to their earlier statement that "[a]ll the officers, except Sowers, were trained at the State Police Academy before the incidents occured" (Petition 7). As the

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[28]The only direct evidence of Sheriff Stairs' policy regarding the use of force was this statement he made at the public meeting following the Davis incident: "The policy on firearms is when deemed necessary. However, now, let me explain this. When you pull a weapon, the policy says, you will make out a report, and it better be valid. In other words, it better hold up in court."

Court of Appeals noted, three of the deputies--Sowers, Cribben and Quantz--had not attended the Academy, or received any real police training, at the time of the incidents here. Pet. App. 40-41.[29] Sowers finally went to the Academy, a month later than the latest the law allowed. Neither Sheriff Stairs nor Undersheriff Hays ever went to the Academy at all. Pet. App. 38. As to Hays, that violated the statute; the Sheriff was exempt from it.

Third, Petitioners say "the Civil Service Commission is responsible for hiring and firing decisions." Petition 20. Even the most extreme reading of the statutes and caselaw governing the civil

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[29]Petitioners' statement is not literally accurate as to Jack Gardner, either. Gardner was not trained by Mason County; he went to the Academy while employed at the Sumner police department--from which he was forced to resign, after four internal investigations into his conduct there. Mason County did not retrain him, but put him in a supervisory role.

service process (discussed in Point III above) do not support this. As noted there, the Commission's role in these processes is limited to screening lists of job applicants for the Sheriff and reviewing his decisions to fire deputies who have been employed more than a year. See pages 39-40, above.

Fourth, the Petitioners say "the Ninth Circuit held, as a matter of law, that "'the County was negligent as a matter of law for failing to train in the constitutional limits of the use of force.'" Petition 20 (emphasis theirs). Their purported quotation appears nowhere in the Court of Appeals' opinion. What the Court of Appeals said was this:

> The jury instructions on this issue were nevertheless harmless because Mason County's failure to adequately train its deputies constituted deliberate indifference as a matter of law.
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> * * *
>
> Mason County's failure to train its officers in the legal limits of the use of force constituted 'deliberate indifference' to the safety of its

> inhabitants as a matter of law.[5] Moreover, there was certainly more than enough evidence presented regarding the inadequacy of training in order to survive Mason County's motion for a directed verdict on the issue of municipal liability.
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> [5]Since we have found failure-to-train liability as a matter of law, there is no need to inquire into whether the two other grounds upon which plaintiffs state their claim - negligent hiring practices and failure to provide adequate supervision - subjected the County to liability.

Pet. App. A-42-43.

As the full quotation makes clear, the Court of Appeals majority gave this as an alternative ground for its decision not to order a new trial on the municipal liability claims, because of the use of the "reckless disregard" language in the jury instructions. See Point II, above. In this civil case, that question was governed by Fed. R. Civ. Pro. 61, which permits reversal only for instructional error which is "inconsistent with substantial justice."

The Court of Appeals found that the instructions' use of the phrase "reckless disregard," if error, did not meet that standard because the evidence clearly established "deliberate indifference," on which the jury was also instructed. It based that on the following statement from City of Canton v. Harris:

> City policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force, see Tennessee v. Garner, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985), can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.
>
> It could also be that the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers, who, nevertheless, are "deliberately indifferent" to the need.

City of Canton v. Harris, 489 U.S. at 390 n.10.

The Court of Appeals used this observation as a starting point for a harmless error analysis essentially similar to that recently spelled out in Yates v. Evatt, 59 U.S.L.W. 4509 (U.S., May 28, 1991), asking whether "the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to ... [assure][30] that the verdict resting on that evidence would have been the same in the absence of the [error.]" 59 U.S.L.W. at 4512-3.

The evidence overwhelmingly showed that the county officials here ignored an "obvious" need to train his deputies in the use of force. New deputies were given full patrol responsibilities, on their own, without Academy training or any real police training at all. This

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[30]Since, unlike Yates, this was not a criminal case, there was no need to find any error harmless beyond a reasonable doubt.

was done even where there had been warnings of potential problems from the screening psychologist. It was done with "lateral hires" like Jack Gardner, with clouded histories with other departments. And it continued even after complaints about the deputies' misuse of force or mistreatment of citizens.

This utter failure to train these men before entrusting them with deadly weapons and police powers ignored a need which was not only "obvious," but known. It was done over the protest of the department's own nominal "field training" officers. It violated the provisions of the training manual compiled under a previous sheriff, whose provisions and requirements the Stairs administration honored wholly in the breach. As the testimony showed, "they totally disregarded not only the industry standards, but their own policies and standards, and they sent officers out on

the street to perform police services without any training whatsoever."

Petitioners protest that training would have had no effect on the deputies' outrageous behavior, so that "the requisite connection to training was never made." Petition 20. To the contrary, the evidence here fully sustained Canton's endorsement of the utility of police training. So did plaintiffs' police expert, who testified that Mason County's policies made it "substantially certain that there would be violations of citizens' civil rights by their deputies."

The defendants' training policies were so deficient, and their deputies propensities and actions were so extreme, that any difference between the concepts of "reckless disregard" and "deliberate indifference," as the District Court defined them, pales into insignificance. Once the jury accepted the plaintiffs'

basic contentions, as they must have by their verdict, they necessarily would have found either standard met. That is all the Court of Appeals majority held.

To the extent the Court of Appeals' language may go farther and suggest that a total failure to train before entrusting police officers with deadly force always constitutes deliberate indifference, it is faithful to this Court's teachings in City of Canton. Canton's dicta on this point do not blur the lines of municipal responsibility in this area, as Petitioners claim (Petition 21), but clarify them starkly. The defendants' actions in this case were not even close to those lines.

The Court of Appeals' alternative affirmance of the jury's finding on municipal liability on this ground was not error, and does not call for this Court's review.

CONCLUSION

From the beginning, this case has turned on its facts. The defendants' conduct was so egregious it violated any applicable legal standard. Those standards were correctly applied by the courts below. The Petition for Certiorari should be denied.

Respectfully submitted,

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September 6, 1991.

APPENDIX A

Washington State Statutes Involved

RCW 36.20.010:

General duties

The sheriff is the chief executive officer and conservator of the peace of the county. In the execution of his office, he and his deputies:

(1) Shall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses ...

RCW 36.28.020:

Powers of deputies, regular and special

Every deputy sheriff shall possess all the power, and may perform any of the duties, prescribed by law to be performed by the sheriff and shall serve or execute, according to law, all process, writs, precepts, and orders, issued by lawful authority.

Persons may also be deputed by the sheriff in writing to do particular acts; including the service of process in civil or criminal cases, and the sheriff shall be responsible on his official bond for their default or misconduct.

RCW 41.14.020:

Terms defined
...

(2) "Appointing power" means the county sheriff who is invested by law with power and authority to select, appoint, or employ any deputy, deputies or other necessary employees subject to civil service;
(3) "Appointment" includes all means of selecting, appointing, or employing any person to any office, place, position, or employment subject to civil service ...

RCW 41.14.130:

Filling vacancies in classified service--Eligibility list--Probation

Whenever a position in the classified service becomes vacant, the appointing power, if it desires to fill the vacancy, shall requisition the commission for the names and addresses of persons eligible for appointment thereto. Before a requisition can be made, the appointing authority shall give employees of the appointing authority who are in layoff status or who have been notified of an intended layoff an opportunity to qualify for any class within the office of the appointing authority. The commission shall certify the names of the three persons highest on the eligible list for the class to which the vacant position has been allocated, who are willing to accept employment. If there is no

appropriate eligible list for the class, the commission shall certify the names of the three persons standing highest on the list held appropriate for such class. If more than one vacancy is to be filled an additional name shall be certified for each additional vacancy. The appointing power shall forthwith appoint a person from those certified to the vacant position.

To enable the appointing power to exercise a greater degree of choice in the filling of positions, no appointment, employment, or promotion in any position in the classified service shall be deemed complete until after the expiration of a period of one year's probationary service, as may be provided in the rules of the civil service commission, during which the appointing power may terminate the employment of the person appointed, if during the performance test thus afforded, upon observation or consideration of the performance of duty, the appointing power deems such person unfit or unsatisfactory for service in the office of county sheriff. Thereupon the appointing power shall again requisition the commission for the names and addresses of persons eligible for appointment in the manner provided by this section and the person appointed in the manner provided by this section shall likewise enter upon said duties for the probationary period, until some person is found who is deemed fit for appointment, employment, or promotion whereupon the appointment, employment, or promotion shall be deemed complete.

APPENDIX B

DEFENDANTS' PROPOSED INSTRUCTION NO. 40

You are instructed that the laws of the State of Washington provide as follows:

The sheriff is the chief executive officer and conservator of the peace of the county. In the execution of his office, he and his deputies:

(1) Shall arrest and commit to prison all persons who break the peace, or attempt to break it, and all persons guilty of public offenses;

(2) Shall defend the county against those who, by riot or otherwise, endanger the public peace or safety;

* * *

(5) Shall attend the sessions of the courts of record held within the county, and obey their lawful orders or directions;

(6) Shall keep and preserve the peace in their respective counties, and quiet and suppress all affrays, riots, unlawful assemblies and insurrections, for which purpose, and for the service of process in civil or criminal cases, and in apprehending or securing any person for felony or breach of the peace, they may call to their aid such persons, or power of their county as they may deem necessary.

RCW 36.20.010.